No. 95-129

In The

Supreme Court of the United States

October Term, 1995

EXXON COMPANY, U.S.A.; EXXON SHIPPING COMPANY,

Petitioners,

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL INC.,

Respondents,

v.

GRIFFIN WOODHOUSE, LTD., BRIDON FIBRES AND PLASTICS, LTD.,

Third-Party Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 24, 1995
Certiorari Granted November 22, 1995

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

UNITED STATES DISTRICT COURT:
DISTRICT OF HAWAII (HONOLULU) DOCKET

PLAINTIFFS	DEFENDANTS
EXXON SHIPPING COMPANY; EXXON COMPANY, U.S.A. (a Division of Exxon Corporation)	PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC.; SOFEC, INC. and PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; AND PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD. AND WERTH ENGINEERING, INC., Third-Party Defendants.

Date	NR	Proceedings
1990		
Apr 18	1	COMPLAINT; Summons Summons issued
	• • •	
May 31	11	*ANSWER* to Complaint; COUNTERLCLAIM; Certificate of Service – on behalf of Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.
May 31	12	Third-Party COMPLAINT; Exhibit A; Certificate of Service; Summons Summons issued
Jun 4	13	First Amended Third-Party Complaint; Exhibit A; Certificate of Service; Summons Summons issued
	• • •	
Jun 7	16	Defendant Sofec, Inc.'s CROSSCLAIM Against Third-Party Defendants Bridon Fibres and Plastics, Ltd., Griffin Woodhouse, Ltd. and Werth Engineering, Inc.; Demand for Jury Trial
Jun 13	17	Plaintiffs' ANSWER to HIRI Defendants' Counterclaim
	• • •	
Jul 30	29	*ANSWER* to Third Party Complaint – on behalf of Third Party Defendant Griffin Woodhouse, Ltd.

Aug 2	30	*ANSWER* of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Complaint; Certificate of Service
Aug 2	31	*CROSSCLAIM* of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd. Against Sofec, Inc., Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc., Exxon Shipping Company, and Exxon Company, U.S.A.; Certificate of Service
Aug 2	32	*ANSWER* of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Crossclaim of Sofec, Inc.; Certificate of Service
Aug 2	33	*ANSWER* of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd. to First Amended Third-Party Complaint; Certificate of Service
Aug 2	34	*ANSWER* of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc. to Complaint; Certificate of Service

Aug 2	35	*CROSSCLAIM* of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc. Against Sofec, Inc., Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc., Exxon Shipping Company, and Exxon Company, U.S.A.; Certificate of Service
Aug 2	36	*ANSWER* of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc. to Crossclaim of Sofec, Inc.; Certificate of Service
Aug 2	37	*ANSWER* of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc. to First Amended Third-Party Complaint; Certificate of Service

* * *

Aug 21	44	Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s *ANSWER* to CROSSCLAIM of Defendant and Third-Party Defendant Bridon Fibres and Plastic, Ltd. Against Sofec, Inc., Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc., Exxon Shipping Company, and Exxon Company, U.S.A.; Certificate of Service

Aug 21	45	Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s *ANSWER* to CROSSCLAIM of Defendant and Third-Party Defendant Werth Engineering and Marine, Inc. Against Sofec, Inc., Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc., Exxon Shipping Company, and Exxon Company, U.S.A.; Certificate of Service
Aug 21	46	Defendant Sofec, Inc.'s *ANSWER* to CROSSCLAIM of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.
Aug 21	47	Defendant Sofec, Inc.'s *ANSWER* to CROSSCLAIM of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc.

* * *

Aug 22	51	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s *ANSWER* to CROSSCLAIM of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.; Certificate of Service

Aug 22	52	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s *ANSWER* to CROSSCLAIM of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc.; Certificate of Service

* * *

1991

* * *

Jan 15	108	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s CROSS-CLAIM Against Defendant Sofec, Inc.; Exhibit A; Certificate of Service

* * *

1992

* * *

Jun 3	366	Notice of Third-Party Defendant Griffin Woodhouse, Ltd.'s Motion to Bifurcate or in the Alternative to Continue Trial; Motion to Bifurcate or in the Alternative to Continue Trial; Memorandum in Support of Motion; Exhibits "A"-"E" – 7/6/92 @ 3:00 p.m., Fong

* * *

Jun 18	369	Plaintiffs Exxon Shipping Company, Inc., and Exxon Company, U.S.A.'s Memorandum in Opposition to Third Party Defendant Griffin Woodhouse Ltd.'s Motion to Bufurcate or in the Alternative, to Continue Trial; Affidavit of Judy S. Given; Exhibit "1" – "6"; Certificate of Service
Jun 18	370	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International Inc.'s Memorandum in Response to Third Party Defendant Griffin Woodhouse, Ltd.'s Motion to Bifurcate or in the Alternative to Continue Trial; Certificate of Service

* * *

Jul 27	427	*EP*: Defendant and Third Party Defendant Bridon Fibres & Plastics Ltd.'s Cross Motion for Partial Summary Judgment; Griffin Woodhouse's Motion to Bifurcate or in the Alternative to Continue Trial; Defendant and Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Joinder in Third Party Defendant Griffin Woodhouse, Ltd.'s Joinder in Cross Motion for Partial Summary Judgment; Third Party Defendant Griffin Woodhouse, Inc.'s Joinder in Cross Motion for Partial

		Summary Judgment – arguments held. Motion to Continue Trial DENIED. All remaining motions taken under advisement (TC) *FONG*
		* * *
Jul 31	431	ORDER GRANTING Motion to Bifurcate, Denying Cross-Motion For Partial Summary Judgment, Denying Motion To Strike Third-Party Griffin Woodhouse, Ltd.'s Reply Memorandum And Granting Motion, In the Alternative, For Leave to File Responsive Memorandum cc: all parties *FONG*
		* * *
Aug 3	433	Notice of Hearing of Plaintiffs Exxon Shipping Company and Exxon Company USA's Motion For Partial Summary Judgment Against Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc. and PRI International, Inc.; Plaintiffs' Motion; Affidavit of Judy S. Givens; Exhibits "A"-"J"; Certificate of Service – 9/21/92 @ 9:00 a.m., Fong
		* * *

Aug 10	462	Notice of Plaintiffs' Motion for Clarification of Order Granting Motion of Order Granting Motion for Bifurcation, Filed July 31, 1992; Plaintiffs' Motion; Memorandum in Support of Plaintiffs' Motion; Affidavit of Judy S. Givens; Exhibits "1" and "2"; Certificate of Service – Referred to Fong
		* * *
Aug 21	491	Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A.'s Reply to Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s Memorandum in Opposition To Plaintiff's Motion For Clarification Filed August 19, 1992; Certificate of Service
		* * *
Aug 27	502	ORDER Denying Plaintiffs' Motion for Clarification cc: all parties *FONG*
		* * *

Sep 21	529	*EP*: VARIOUS MOTIONS – 1. Defendant & Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Cross – M/Partial Summary Judgment on Contract – Based Claims – GRANTED. 2. Defendant & Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Cross – M/Partial Summary Judgment on Negligence Claims – GRANTED. 3. Third-Party Defendant Griffin Woodhouse, Ltd.'s Joinder in the above two motions – GRANTED. 4. Plaintiff's M/Partial Summary Judgments Against Defendants PRI, Hawaiian Independent Refinery and PRI International, Inc. – taken under ADVISEMENT. 5. Defendant/ Third Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s M/Partial Summary Judgment – taken under ADVISEMENT. (YI) ***FONG***
		* * *
Sep 24	531	ORDER Granting Motions By Defendant And Third-Party Defendant Bridon Fibres And Plastics, Ltd. For Partial Summary Judgment On Contract and Negligence Claims – on behalf of Defendant and Third-Party Defendant Bridon Fibres and Plastics ***FONG***

Sep 25	532	Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s Supplemental Memorandum In Support of Motion For Partial Summary Judgment And In Opposition To Defendants and Third Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s Motion For Partial Summary Judgment; Declaration of Judy S. Givens; Exhibits "A" through "G"; Certificate of Service
		* * *
Oct 2	536	*EP*: Final Pretrial Conference – held. Parties apprised of deadlines. Parties willing to go to trial at the last minute. 24 hour notice of change of witnesses. (In chambers) ***YAMASHITA***
		* * *
Oct 9	538	ORDER Granting In Part Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. And PRI International, Inc.'s Motion For Partial Summary Judgment And Granting In Part Plaintiff's Exxon Shipping Company, Inc. And Exxon Company, U.S.A.'s Motion For Partial Summary Judgment cc: all parties ***FONG***
		* * *

Dec 2	543	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. And PRI International, Inc.'s Position Paper Regarding The Presentation Of Evidence Concerning Gall-Thompson Breakaway Couplings During Phase I Of These Proceedings; Exhibits "A"-"C"; Certificate of Service
Dec 2	544	Plaintiffs' Memorandum Concerning Phase of Bifurcated Trial In Which Evidence Concerning Gall Thompson Couplings Should Be Considered; Declaration of Counsel; Exhibits "A" through "H"; Certificate of Service

* * *

Dec 8	546	*EP*: Rule 16 Conference – Discussion held regarding the breakaway couplings. Court ruled that the issue of breakaway couplings is excluded from evidence in Phase One of the trial, but may be addressed in Phase Two. Mr. Krek will prepare the order (TC) ***FONG***

* * *

1993

* * *

Feb 4	563	Notice of Motion; Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. And PRI International, Inc.'s Motion in Limine To Preclude Testimony of Thomas Cornwall, D. Stephen Kuntz, Clement Marino, Michael J. Turina And John Mascenik; Memorandum In Support of Motion; Exhibits A to C; Certificate of Service – 2/9/93 @ 9:00 a.m., Fong

* * *

Feb 4	565	Defendant And Third-Party Defendant Bridon Fibres And Plastics, Ltd.'s Motion In Limine To Exclude The May 23, 1989 Ruling Of United States Coast Guard Administrative Law Judge Harry Gardner Re: Navigational License of Captain Kevin Coyne; Memorandum In Support of Motion; Declaration of Nenad Krek; Exhibit "A"; Certificate of Service – 2/9/93 @ 9:00 a.m., Fong

* * *

Feb 5	567	Defendant and Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Memorandum in Response to Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc.'s Motion in Limine to Exclude All Evidence Relating to Subsequent Remedial Measures; Certificate of Service
Feb 5	569	Defendant and Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Notice of Motion in Limine to Exclude the May 23, 1989 Ruling of United States Coast Guard Administrative Judge Harry Gardner re: Navigational License of Captain Kevin Coyne; Certificate of Service – set for 2/9/93 @ 9:00 a.m. Fong

Feb 8	574	Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s Memorandum in Opposition to Defendant and Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion in Limine to Exclude the May 23, 1989 Ruling of United States Coast Guard Administrative Law Judge Harry Gardner re: Navigational License of Captain Kevin Coyne; Certificate of Service
Feb 8	578	Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s Position Concerning Defendants Pacific Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc.'s Motion in Limine to Preclude Testimony of Thomas Cornwall, D. Stephen Kuntz, Clement Marino, Michael J. Turina, and John Mascenik; Certificate of Service

Feb 9	580	*EP*: Non Jury Trial – 1st day – 1. Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc.'s Motion in Limine to Exclude All Evidence Relating to Subsequent Remedial Measures DENIED. 2. Defendant and Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion in Limine to Exclude the 5/23/89 Ruling of U.S. Coast Guard Administrative Judge Harry Garner re: Navigational License of Captain Kevin Coyne GRANTED. 3. Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc.'s Motion in Limine to Preclude International, Inc.'s Motion in Limine to Preclude Testimony of Thomas Cornwall, D. Stephen Kuntz, Clement Marino, Michael J. Turina and John Mascenik – ruling deferred until the witnesses are offered. Opening statements made by each of the parties. Kevin P. Coyne CST. Exhibits stipulated into evidence: 1 through 5, 7, 8, 9, 11 thru 14, 17 thru 20, 22 thru 31, 43, 58 thru 61, 63, 67 thru 73, 76, 88, 91, 92, 93, 95 thru 100, 109, 110, 113, 114, 115, 118, 120, 121, 123, 124, 131, 134, 135, 136, 138, 150, 151, 158, 160, 161, 186, 187, 231, 235, 243, 244, 245, 247 thru 251. Further trial continued to 2/10/93 @ 9:00 a.m. (SP) *FONG*

• • •

Feb 12	584	ORDER Granting Defendant and Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion in Limine to Exclude the Decision and Order of the United States Coast Guard Administrative Law Judge Harry Gardner re: Navigational License of Captain Kevin Coyne – On Behalf of Defendant *FONG*

• • •

Feb 16	588	Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s Brief Concerning the Mandatory Nature of Improvements to the Hawaiian Independent Refinery, Inc.'s Single Point Mooring; Certificate of Service
Feb 16	589	Supplemental Memorandum in Support of Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc.'s Motion in Limine to Exclude All Evidence Relating to Subsequent Remedial Measures Filed on February 4, 1993; Affidavit of Kathleen M. Douglas; Exhibit J; Certificate of Service – On Behalf of Defendants

• • •

Feb 23	596	Plaintiffs Exxon Shipping Company, Inc. And Exxon Company, U.S.A.'s First Amended Designation of The Deposition Testimony of Michael J. Turina; Certificate of Service
		* * *
Feb 25	606	*EP*: Further Non Jury Trial – 10th Day – Examination of James Stilwell resumed. Exhibits Admitted: 322, 324, 325, 331 & 332. Motion for Admission of the Following Depositions: John Mascenik, Thomas Cornwall and D. Stephen Kuntz – GRANTED and Subject to Motion to Strike. Received the Following depositions: Isaac Denton, David Kowalchyk, Richard Spear, James T. Lincoln, Raymond Spiller, Clement T. Marino, Michael J. Turina, Karl Bathen and Marie Helen Hunke. Plaintiff rested. Defendants' Motion For Judgment on Partial Findings Pursuant to Rule 52(c) – DENIED. Plaintiff's Motion For Judgment on Partial Findings Pursuant to Rule 52(c) – DENIED. Further Trial continued to February 26, 1993 @ 9:00 a.m. (SP) *FONG*
		* * *
Apr 20	624	Stipulation concerning safe Berth Clause – on behalf of Plaintiffs

May 20	625	FINDINGS OF FACT AND CONCLUSIONS OF LAW – [Defendants are not legally responsible for the stranding of the Exxon Houston; Court holds Captain Coyne and his employer Exxon legally responsible] cc: all parties *FONG*
		* * *
Jun 16	627	NOTICE OF APPEAL by Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.; Certificate of Service (CA 90-271)
		* * *
Jul 20	629	Notice of Motion; Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion for Partial Summary Judgment as to Defendants Pacific Resources, Inc.; Hawaiian Independent Refinery, Inc.; PRI Marine Inc. and PRI International, Inc.'s claims for Damage to the Single Point Mooring; Memorandum In Support of Motion for Partial Summary Judgment; Declaration of Nenad Krek; Exhibits "A"-"C"; Certificate of Service – set for 9/13/93 @ 3:00 p.m., Fong

Aug 2	630	Notice of Hearing; Defendant Sofec, Inc.'s Motion for Pretrial Statement Judgment as to Defendants Pacific Resources, Inc. Hawaiian Independent Refinery Inc. PRI Marine, Inc., and PRI International, Inc.'s claims for damages to the single point mooring; Memorandum In Support of Motion for Summary Judgment; Affidavit of Randall K. schmitt; Exhibits "A"-"E"; Certificate of Service set for 10/12/93 @ 10:30 a.m., Fong
Aug 2	631	Amended Notice of Motion of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion for Partial Summary Judgment as to Defendants Pacific Resources, Inc.; Hawaiian Independent Refinery, Inc.; PRI Marine Inc. and PRI International Inc.'s claims for Damage to the Single Point Mooring; Certificate of Service – set for 10/12/93 @ 10:30 a.m., Fong

* * *

Aug 17	634	Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A.'s Opposition to Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion for Partial Summary Judgment as to Defendants Pacific Resources, Inc.; Hawaiian Independent Refinery, Inc.; PRI Marine Inc. and PRI International, Inc.'s Claims for Damage to the Single Point Mooring; Exhibit "A"; Certificate of Service
Aug 17	635	Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A.'s Opposition to Defendant Sofec, Inc.'s Motion for Partial Summary Judgment as to Defendants and Third-Party Plaintiffs Pacific Resources, Inc., PRI Marine Inc. and PRI International, Inc.'s Claims for Damage to the Single Point Mooring; Exhibit "A"; Certificate of Service

Aug 17	636	Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A.'s Opposition to Third-Party Defendant Griffin Woodhouse, Ltd.'s Motion for Partial Summary Judgment as to Defendants and Third-Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine Inc. and PRI International, INC.'s Claims for Damage to the Single Point Mooring; Exhibit "A"; Certificate of Service
		* * *
Oct 22	659	ORDER Granting Sofec's, Bridon Fibres and Plastics', and Griffin Woodhouse's motions for Partial Summary Judgment – HIRI is precluded from recovering in tort for damage to the SPM cc: All parties
Nov 5	660	ORDER GRANTING Bridon Fibres and Plastics' motion to Dismiss Allegations of Diversity and to Strike Demand for a Jury Trial and Granting Sofec's motion for Leave to Amend Pleadings to Proceed in Admiralty cc: All counsel *FONG*
Nov 29	661	Order – 9th CCA – That the appeal in this case is hereby DISMISSED. (CA 93-16236) (Filed and entered 11/4/94) ***SCHROEDER, D.W. NELSON & THOMPSON***

1994

Jan 12	662	Notice of Motion; Motion of Defendant/Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Direct Entry of a Final Judgment Upon Plaintiffs' claims for Damages caused by the Grounding of the Exxon Houston; Memorandum In Support of Motion; Certificate of Service – set for 3/14/94 @ 10:30 a.m., Fong
Jan 19	663	Defendant Sofec, Inc.'s Joinder in Defendant/Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion to Direct Entry of Final Judgment Upon Plaintiffs' Claims for Damages Caused by the Grounding of the Exxon Houston Filed on January 12, 1994; Certificate of Service – set for 3/14/94 @ 10:30 a.m., Fong
Jan 25	664	Defendant/Third-Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s Joinder in Defendant/Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion to Direct Entry of a Final Judgment Upon Plaintiffs' Claims for Damages Caused by the Grounding of the Exxon Houston Filed on 1/12/94; Certificate of Service
		* * *

Feb 22	666	Plaintiffs' Memorandum in Opposition to Motion of Defendant/Third Party Defendant Bridon Fibres and Plastics, Ltd. to Direct Entry of a Final Judgment Upon Plaintiffs' Claims for Damages Caused by the Grounding of the Exxon Houston Filed January 12, 1994; Certificate of Service
Feb 22	667	Notice of Motion; Motion of Plaintiffs to Direct Entry of a Final Judgment Upon the Findings of Fact and Conclusions of Law Entered on May 201, 1993, and for a Stay; Memorandum in Support of Motion; Certificate of Service set for 3/14/94 @ 10:30 a.m., Fong
Feb 23	668	Defendants/Third-Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s Joinder in Motion of Defendant/Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Direct Entry of a Final Judgment Upon Plaintiff's claim for Damages caused by the Grounding on the Exxon Houston; Certificate of Service

* * *

Mar 31	674	ORDER Directing Entry of A Final Judgment Pursuant to Fed. R. Civ. P. 54(b) Upon Less Than All Claims And As To Less Than All Parties *FONG*

* * *

Apr 20	676	JUDGMENT – that pursuant to Fed. R. Civ. P. 54(b), final judgment is hereby entered against plaintiffs on all causes of action stated in their complaint as follows: A. In favor of all Defendants on Plaintiffs' claim for damages to and loss of the Exxon Houston; and B. In favor of Defendants Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., on Plaintiffs' claim for recovery of costs of clean-up of the bunker oil spill. (cc: all parties) *CHINN*
Apr 25	677	NOTICE OF APPEAL by Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.; Certificate of Service

Plaintiff	Defendant
Exxon Shipping Company, et al.	Pacific Resources, Inc., et al.

GENERAL DOCKET FOR NINTH CIRCUIT
COURT OF APPEALS

Court of Appeals Docket #: 94-15806
Nsuit: 4120 Contract – Marine (Div) Filed: 5/10/94
Exxon Shipping, et al. v. Pacific Resources, et al.
Appeal from: District of Hawaii (Honolulu)

Date	Proceedings
5/11/94	Docketed Cause and Entered Appearances of Counsel
	* * *
8/1/94	Filed certificate of record on appeal RT filed in DC 7/22/94 (em)
	* * *
10/19/94	Filed original and 15 copies Appellants Exxon Shipping, and Exxon Company opening brief (Informal: no) 46 pages and five excerpts of record in 02 volumes; served on 10/17/94 (ot)
12/21/94	Filed original and 15 copies Appellees Pacific Resources Inc, et al. 49 pages, 05 Suppl Exc. 01 vols: served on 12/19/94 minor defcy: no Statement of Related Cases, Notified counsel, appellants' reply brief due 1/9/95 for Exxon Company, for Exxon Shipping; minor brief deficiency response due 1/4/95; records on appeal due 1/9/95; (ot)

12/27/94	Filed original and 15 copies Appellee Pacific Resources, Appellee Hawaiian Independent, Appellee PRI Marine, Inc., Appellee PRI International supplemental brief of 15 pages, served on 12/19/94 (rei)
12/28/94	Received Appellee Bridon Fibres satisfaction of (minor) brief deficiency. (stmnt of related cases, table of contents, table of authorities & no proof of service) RECORDS** (vt)
	* * *
1/20/95	Filed original and 15 copies Exxon Shipping, Exxon Company reply brief, (Informal: no) 25 pages; served on 1/18/95 [PANEL] (ot)
	* * *
2/13/95	FILED CERTIFIED RECORD ON APPEAL IN 19 VOLS. (total): 0 CLERKS REC; 19 RTs (ORIG) (ot)
	* * *
3/14/95	ARGUED AND SUBMITTED TO William C. CANBY, Charles E. WIGGINS & Thomas G. NELSON; CJJ. (jr)
4/26/95	FILED OPINION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Signed, Published. William C. CANBY; Charles E. WIGGINS; Thomas G. NELSON, author.) FILED AND ENTERED JUDGMENT. (dl)
	* * *
5/10/95	Filed original and 03 copies Appellant Exxon Shipping, Appellant Exxon Company petition for rehearing, (PANEL) 14 p. pages, served on 5/9/95 (ot)
	* * *

5/24/95	Filed order (William C. CANBY; Charles E. WIGGINS; Thomas G. NELSON,): Aplts' petition for rehearing is denied. (em)
6/1/95	MANDATED ISSUED. Costs taxed against plaintiffs (Exxon) in the amount of $545.50 in favor of Bridon Fibres. (jr)
8/3/95	Rec'd notice from Supreme Court; petition for certiorari filed on 7/24/95, Supreme Court No. 95-129. (jr)

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC. Defendants.	CIVIL NO. 90-00271HMF COMPLAINT; SUMMONS (Filed Apr. 18, 1990)

COMPLAINT

Plaintiffs EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation) (hereinafter "EXXON COMPANY, U.S.A."), as a

Complaint against Defendants PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC. (hereinafter collectively "HIRI"), and SOFEC, INC. allege as follows:

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears, and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and 28 U.S.C. 1333.

PARTIES

2. EXXON SHIPPING COMPANY at all material times herein, was the owner and operator of EXXON HOUSTON, Official No. D297151, an oil tanker of U.S. registry.

3. EXXON COMPANY, U.S.A. and PRI INTERNATIONAL, INC. at all material times herein were parties to a "sales contract". By this contract, PRI INTERNATIONAL, INC. extended to EXXON COMPANY, U.S.A., and to all vessels mooring at HIRI's Single Point Mooring (hereinafter "SPM") buoy within the terms of the contract, a warranty of safe berth.

4. EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. at all material times herein were parties to a "Contract of Affreightment" pertinent parts of which concerned the mooring of EXXON HOUSTON to HIRI's SPM buoy. By this contract, EXXON COMPANY, U.S.A. extended a warranty of safe berth to EXXON HOUSTON.

5. HIRI Defendants PRI INTERNATIONAL, INC., PRI MARINE, INC., and HAWAIIAN INDEPENDENT

REFINERY, INC., are wholly owned subsidiaries of HIRI Defendant PACIFIC RESOURCES, INC.

6. SOFEC, INC. at all material times herein was the manufacturer and/or distributor of a CALM-type single point mooring buoy, its appurtenances, gear and equipment (hereinafter "SPM" or "SPM buoy") located at Barber's Point, Oahu, Hawaii.

7. HIRI, at all materials times herein, was the owner and/or operator of the said SPM buoy.

FACTS

8. On or about March 2, 1989, EXXON HOUSTON was moored at HIRI's SPM buoy and was operated under the terms and conditions of the aforesaid "sales contract" and "Contract of Affreightment".

9. EXXON SHIPPING COMPANY duly performed all terms and conditions of the Contract of Affreightment to be performed.

10. EXXON COMPANY, U.S.A. duly performed all terms and conditions of the sales contract to be performed.

11. EXXON HOUSTON, previous to the events described in this Complaint, was in all material respects tight, strong, staunch, seaworthy and fit for the subject voyage.

12. The sales contract provided that ownership of the cargo oil shifted to HIRI once the oil passed the last flange on the vessel into HIRI's cargo hoses.

13. At approximately 1715 on March 2, 1989, the chafing chain, which was part of HIRI's mooring equipment on its SPM buoy, parted, causing EXXON HOUSTON to breakaway from its berth. EXXON HOUSTON immediately closed its cargo valves, which prevented any further discharge of crude oil from EXXON HOUSTON. HIRI's floating cargo hoses subsequently parted, spilling HIRI's oil from the cargo hoses into the sea. EXXON HOUSTON subsequently went aground due to the breakaway and suffered severe hull damage.

14. At all material times herein, EXXON HOUSTON was commanded by Captain Kevin P. Dick, Coast Guard Master's License No. 010448.

15. At all material times herein, a compulsory mooring master/pilot employed and designated by HIRI was aboard EXXON HOUSTON for the purpose, among other things, of advising EXXON HOUSTON's master concerning; navigation in the vicinity of HIRI's berth, local weather and sea conditions and local navigational hazards, mooring and unmooring at HIRI's berth, connecting and disconnecting HIRI's cargo hoses, and loading and discharging cargo through HIRI's cargo hoses. Mooring Master Steve Marvin was aboard EXXON HOUSTON at or about the time of the said breakaway.

16. At all material times herein, HIRI required EXXON SHIPPING COMPANY, EXXON COMPANY, U.S.A., and EXXON HOUSTON to use the services of a mooring master and pilot appointed by HIRI.

17. On or about March 1, 1989, HIRI, through its mooring master, directed and supervised the mooring of

EXXON HOUSTON to HIRI's SPM buoy. HIRI, through its mooring master, subsequently supervised and directed the hook up of HIRI's cargo hoses and discharge of its cargo.

FIRST CAUSE OF ACTION – BREACH OF CONTRACT AND WARRANTIES

18. Plaintiffs reallege Paragraphs 1 through 17 of this Complaint as if set forth at length hereinafter.

A. BREACH OF WARRANTY OF SAFE BERTH.

19. The sales contract between EXXON COMPANY, U.S.A. and PRI INTERNATIONAL, INC. provides in part as follows:

> "The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat."

20. EXXON SHIPPING COMPANY and EXXON HOUSTON are third-party beneficiaries to the sales contract.

21. The Contract of Affreightment between EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. provides in part as follows:

> "The loading or discharge berth shall be . . . designated by EUSA. . . . The berth shall be safe so that vessels can always lie safely afloat while proceeding to, remaining at, or departing from it."

22. HIRI expressly and impliedly warranted to EXXON COMPANY, U.S.A., to EXXON SHIPPING COMPANY and to EXXON HOUSTON to provide a safe berth to EXXON HOUSTON.

23. HIRI breached its contractual and implied warranties to provide a safe berth to EXXON HOUSTON.

24. EXXON COMPANY, U.S.A is obligated to pay the damages suffered by EXXON SHIPPING COMPANY and EXXON HOUSTON as a result of HIRI's breaches of contractual and implied warranties.

25. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's violation of its contractual and implied warranties to provide a safe berth.

26. By reason of its violation of its contractual and implied warranties to provide a safe berth, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY, and EXXON COMPANY, U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fees and fines that may be imposed upon it by reason of the events described in the Complaint.

B. BREACH OF DUTY TO CLEAN UP OIL.

27. The sales contract further provides in part as follows:

> "In the event a cargo is spilled or escapes during the loading or discharging of a vessel or when vessel is in close proximity to the terminal, whether such spill is caused by the terminal, vessel, third parties, or otherwise, the terminal shall undertake such measures as reasonably necessary to prevent or mitigate resulting pollution damage."

28. HIRI breached its duty to undertake such measures as reasonably necessary to prevent or mitigate resulting pollution damage.

29. As a legal result of such aforesaid breach, EXXON HOUSTON, EXXON SHIPPING COMPANY, and EXXON COMPANY, U.S.A. suffered damages and expenses to clean up the oil spill for which HIRI is liable.

C. BREACH OF DUTY TO PAY FOR CARGO.

30. The said sales contract further provides in part as follows:

> "Title to, risk of loss, and liabilities for all cargo delivered hereunder shall be deemed to occur when it passes the flange connection between the vessel's manifold and the hose connection at the port of load or discharge . . . "

31. HIRI breached the said sales contract with EXXON COMPANY, U.S.A. by its failure to pay for cargo delivered under the terms of the contract.

32. As a result of said breach by non-payment, EXXON COMPANY, U.S.A. suffered damages for which HIRI is liable.

SECOND CAUSE OF ACTION – BREACH OF WARRANTY

33. Plaintiffs reallege Paragraphs 1 through 32 of this Complaint as if set forth at length hereinafter.

A. BREACH OF WARRANTY OF WORKMANLIKE PERFORMANCES.

34. The sales contract further provides in part as follows:

> "Hoses for loading or discharging, as the case may be, shall be furnished by the terminal and shall be connected and disconnected by the terminal. . . . "

35. At all material times herein, HIRI agreed to furnish stevedoring and terminal services to EXXON HOUSTON, EXXON SHIPPING COMPANY, and EXXON COMPANY, U.S.A.

36. HIRI warranted, expressly and impliedly, to EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. to perform the stevedoring and terminal services in a workmanlike manner.

37. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by violation of HIRI's warranty of workmanlike performance.

38. By reason of its violation of its warranty of workmanlike performance, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON

SHIPPING COMPANY and EXXON COMPANY U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fees and fines that may be imposed upon them by reason of the events subscribed in the Complaint.

B. BREACH OF EXPRESS WARRANTY

39. HIRI, through its employee, Mooring Master Marvin, expressly warranted to the Master of EXXON HOUSTON, that HIRI's berth was safe in the weather and sea conditions prevailing just prior to the breakaway on March 2, 1989.

40. HIRI breached its express warranty that its berth was safe in the weather and sea conditions prevailing on March 2, 1989.

41. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's violation of its express warranty that HIRI's berth was safe in the weather and sea conditions prevailing prior to the breakaway on March 2, 1989.

42. By reason of its violation of its express warranty regarding conditions prevailing just prior to the breakaway, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A., and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fees

and fines, that may be imposed upon them by reason of the events described in the Complaint.

THIRD CAUSE OF ACTION – NEGLIGENCE

43. Plaintiffs reallege Paragraphs 1 through 42 of this Complaint as if set forth at length hereinafter.

44. HIRI negligently failed to provide a safe berth and adequate mooring for EXXON HOUSTON.

45. HIRI negligently furnished a mooring master and pilot to EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A.

46. HIRI negligently failed to provide information to assist the Master of EXXON HOUSTON in local navigation after the parting of HIRI's SPM buoy chafing chain.

47. HIRI negligently failed to maintain, inspect and repair its SPM buoy.

48. HIRI negligently failed to establish and maintain safe operating weather and sea parameters for its SPM buoy.

49. HIRI negligently failed to provide adequate equipment to safely conduct cargo operations on EXXON HOUSTON and perform oil spill cleanup.

50. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of the EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent failure to provide a safe berth and adequate mooring.

51. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent furnishing of a mooring master and pilot.

52. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent failure to maintain, inspect, and repair its SPM buoy.

53. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent failure to establish and maintain safe operating weather and sea parameters for its SPM buoy.

54. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent failure to provide adequate equipment to properly discharge the cargo and perform oil spill cleanup.

55. By reason of its negligent failure to provide a safe berth and adequate mooring, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY,

U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

56. By reason of its negligent furnishing of a mooring master and pilot, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A., and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

57. By reason of its negligent failure to maintain, inspect and repair its SPM buoy, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

58. By reason of its negligent failure to establish and maintain safe operating weather and sea parameters for its SPM buoy, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

59. By reason of its negligent failure to provide adequate equipment to properly discharge cargo and perform oil spill cleanup, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

FOURTH CAUSE OF ACTION – PRODUCTS LIABILITY

60. Plaintiffs reallege Paragraphs 1 through 59 of this Complaint as if set forth at length hereinafter.

61. At all material times herein, Defendant SOFEC, INC. negligently designed, manufactured, selected materials, assembled, inspected, tested, maintained for sale, marketed, distributed, leased, sold, recommended and delivered the aforesaid SPM buoy in such a manner so as to cause said SPM buoy to be in a defective and unsafe condition, and unfit for use in the way and manner such products are customarily treated, used and employed; and, that Defendant SOFEC, INC. negligently failed to discover said defects and/or failed to warn and/or adequately test and give adequate warning or instructions of known or knowable hazards, dangers, and risks to users of said SPM buoy of said defects and dangers.

62. At all material times herein, said SPM buoy was in substantially the same condition as at the time of design, manufacture, assembly, testing, inspection, marketing, distribution and sale.

63. At all material times herein, said SPM buoy failed to meet consumer expectations of safety, and was unreasonably dangerous and in a defective condition as to design and marketing, and Defendant SOFEC, INC. failed to warn or give adequate warning calculated to reach the ultimate users or consumers of the dangers of said SPM buoy.

64. At all material times herein, Defendant SOFEC, INC. at the time of design, manufacture and sale of said SPM buoy, expressly and impliedly warranted that said SPM buoy was of merchantable quality, properly designed, manufactured and reasonably fit and suitable for ordinary use as a mooring facility for oil tankers.

65. At all material times herein, Defendant SOFEC, INC. breached said warranty, in that, among other things, said SPM buoy was not of merchantable quality nor properly designed nor manufactured nor fit for ordinary use as a mooring facility for oil tankers; that said SPM buoy was designed, manufactured, fabricated, assembled, supplied, marketed, sold and distributed in such a dangerous and defective condition that said SPM buoy was reasonably likely to, and did, cause legal injury by reason of Defendant SOFEC, INC.'s design and manufacture and failure to warn; and further said SPM buoy could not safely be used by persons exercising ordinary and reasonable care.

66. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were

legally caused by SOFEC, INC.'s negligent design, manufacture, selection of materials, assembly, inspection, testing, maintenance for sale, marketing, distribution, lease, sale, recommendations, and delivery of the aforesaid SPM buoy; and legally caused by SOFEC, INC.'s negligent failure to discover said defects and/or failure to warn and/or failure to adequately test and give adequate warning or instructions of known or knowable hazards, dangers, and risks to users of said SPM buoy of said defects and dangers.

67. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by the failure of SOFEC, INC.'s SPM buoy to meet consumer expectations of safety and by the unreasonably dangerous and defective condition as to design and marketing of the SPM buoy, and by SOFEC, INC.'s failure to warn or give adequate warning, calculated to reach the ultimate users or consumers of the dangers of said SPM buoy.

68. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by SOFEC, INC.'s breach of expressed and implied warranties that said SPM buoy at the time of design, manufacture and sale was of merchantable quality, properly designed, manufactured and reasonably fit and suitable for ordinary use as a mooring facility of oil tankers.

69. By reason of SOFEC, INC.'s negligent design, manufacture, selection of materials, assembly, inspection, testing, maintenance for sale, marketing, distribution, lease, sale, recommendations, and delivery of the aforesaid SPM buoy; and by reason of SOFEC, INC.'s negligent failure to discover said defects and/or failure to warn and/or adequately test and give adequate warning or instruction of known or knowable hazards, dangers, and risks to users of said SPM buoy of said defects and dangers; and by reason of the failure of SOFEC, INC.'s SPM buoy to meet consumer expectations of safety and the SPM buoy's unreasonably dangerous and defective condition as to design and marketing, and SOFEC, INC.'s failure to warn or give adequate warning calculated to reach the ultimate users or consumers of the dangers of said SPM buoy; and by reason of SOFEC, INC.'s violation of its expressed and implied warranties that said SPM buoy at the time of design, manufacture and sale, was of merchantable quality, properly designed, manufactured and reasonably fit and suitable for ordinary use as a mooring facility for oil tankers; SOFEC, INC. is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. and SOFEC, INC. is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fines and fees that may be imposed upon them by reason of the events described in the Complaint.

DAMAGES

70. As a result of the aforesaid breaches of contract, breaches of warranties, product defects, and negligence,

EXXON SHIPPING COMPANY has suffered the following damages: property damage to EXXON HOUSTON; incidental damages, including but not limited to, salvage, refloating, towage, surveying, port charges, additional personnel and repairs; loss of charter hire; loss of use of the vessel; loss of profits; loss of business opportunities; loss of good will; costs assessed and incurred for oil cleanup and environmental restoration; attorneys' fees and litigation costs; and additional expenses and related damages in the approximate amount of SIXTEEN MILLION DOLLARS ($16,000,000.00), as near as can now be calculated, none of which has been paid although duly demanded.

71. As a result of the aforesaid breaches of contract, breaches of warranty, product defects, and negligence, EXXON COMPANY, U.S.A. has suffered the following damages: non-payment for its cargo, loss of profit, the obligation to reimburse EXXON SHIPPING COMPANY and EXXON HOUSTON for their damages as a result of the subject incident; attorneys' fees and litigation costs in an amount to be proven at trial.

WHEREFORE, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. demand judgment against HIRI and SOFEC, INC. jointly and/or severally in an amount to be proven at trial, estimated to be approximately SIXTEEN MILLION DOLLARS ($16,000,000.00) plus non-payment for cargo, in addition to interest, costs, reasonable attorneys' fees, and such other and further relief as this Court deems proper.

DATED this 18th day of April, 1990 at Honolulu, Hawaii.

ALCANTARA & FRAME

/s/ Joy Lee Cauble
LEONARD F. ALCANTARA
JOY LEE CAUBLE
Of Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation, Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC. Defendants.	CIVIL NO. SUMMONS

SUMMONS

TO: PACIFIC RESOURCES, INC.
733 Bishop Street
Honolulu, Hawaii 96813

HAWAIIAN INDEPENDENT REFINERY, INC.
733 Bishop Street
Honolulu, Hawaii 96813

PRI MARINE, INC.
733 Bishop Street
Honolulu, Hawaii 96813

PRI INTERNATIONAL, INC.
733 Bishop Street
Honolulu, Hawaii 96813

SOFEC, INC.
6300 Rothway, Suite 100
Houston, Texas 77040

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiffs' attorneys ALCANTARA & FRAME, 900 Fort Street, Suite 1100, Honolulu, Hawaii 96813 an answer to the Complaint which is herewith served upon you within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

DATED: Honolulu, Hawaii, APR 18 1990.

Walter A.Y.H. Chinn
CLERK [Seal]

(s) Marcia Mullins
BY DEPUTY CLERK

GOODSILL ANDERSON QUINN & STIFEL

JOHN R. LACY 1397-0
1600 Bancorp Tower
130 Merchant Street
Honolulu, Hawaii 96813
Telephone: (808) 547-5600

Attorney for Third-Party
Defendant, GRIFFIN WOODHOUSE, LTD.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC., Defendants,	CIVIL NO. 90-00271 HMF NOTICE OF THIRD-PARTY DEFENDANT GRIFFIN WOODHOUSE, LTD.'S MOTION TO BIFURCATE OR IN THE ALTERNATIVE TO CONTINUE TRIAL; MOTION TO BIFURCATE OR IN THE ALTERNATIVE TO CONTINUE TRIAL; MEMORANDUM IN SUPPORT OF MOTION; EXHIBITS "A"-"E"

and PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs.	(Filed June 3, 1992) TRIAL DATE: October 13, 1992 DATE : July 6, 1992 TIME : 3:00 pm JUDGE: Harold M. Fong

* * *

economy is evident because trial time would be reduced from 8 weeks to 2 weeks at the most. Furthermore, there will be no entitlement to a jury trial as demanded by Sofec since the sole issue before the Court is solely within the admiralty jurisdiction of the Court. A jury trial of this case could easily exceed 10 weeks.

The savings of time and cost to the parties cannot be overstated. Deposition time can be reduced by at least 50 days, though several of the depositions involving technical matters concerning metallurgy in particular may take several days each. Furthermore, expert fees and attorneys' costs and expenses collectively will probably exceed $750,000 for this discovery. These are funds which could be available for settling the remaining minor damage disputes amongst the parties once the navigation issue is resolved.

Griffin Woodhouse submits that the Court's bifurcation of the issue of whether Captain Dick's navigation of the Exxon Houston for approximately 3 hours was the proximate cause of the grounding is warranted by the

time and cost savings to both the Court and the parties. Griffin Woodhouse respectfully requests that to further assure cost effectiveness in time and expenses for all concerned that the

* * *

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Attorneys for Plaintiffs
EXXON SHIPPING COMPANY, INC. and
EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC., Defendants,	CIVIL NO.: 90-00271 HMF IN ADMIRALTY PLAINTIFFS EXXON SHIPPING COMPANY, INC. and EXXON COMPANY, U.S.A.'S MEMORANDUM IN OPPOSITION TO THIRD-PARTY DEFENDANT GRIFFIN WOODHOUSE LTD.'S MOTION TO BIFURCATE OR IN THE ALTERNATIVE, TO CONTINUE TRIAL; AFFIDAVIT OF JUDY S. GIVENS; EXHIBITS "1" - "6"; CERTIFICATE OF SERVICE

PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC.,	(Filed June 18, 1992)
	Trial Date: October 13, 1992
	Hearing date: July 6, 1992
	Time: 3:00 p.m.
Third-Party Plaintiffs,	Judge Harold M. Fong
vs.	
BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.,	
Third-Party Defendants.	

• • •

Thus, contrary to Griffin's assertions, the cause or causes of the HOUSTON's grounding are neither simple nor undisputed. Only after the Court has heard and considered all of the evidence will it be in a position to determine the causes of the grounding and the fault of the parties.

III. ARGUMENT

While Exxon suspects that Griffin's motion to bifurcate was brought only to cast its alternate motion to continue in a more favorable light, and with no sincere belief that the bifurcation would be granted, Exxon will address matters in the order set forth by Griffin.

1. BIFURCATION ALONG THE LINES SOUGHT BY GRIFFIN SHOULD NOT BE PERMITTED.

Griffin has not cited a single case in which bifurcation has been permitted when comparative fault might apply. There are no such cases.

It is true the trial court has discretion to sever claims or issues for separate trial under FRCP 42, when a separate trial will further *"convenience"*, *"avoid prejudice"*, or *"be conducive to expedition and economy"*. In doing this, the court must of course preserve the right to jury trial claimed by any of the parties.

Bifurcation in this case would convenience only the defendants, could actually increase costs and litigation time, and would be severely prejudicial to plaintiffs. The prejudice would result from the exclusion of all evidence supporting a finding of fault by the defendants.

Griffin argues that if the Court will only focus on whether Captain Dick's navigation caused the HOUSTON to ground, and disregard all the evidence plaintiffs wish to present concerning such matters as the cause of the chafe chain's failure, Sofec's design of the Single Point Mooring, the operation and maintenance of the Single Point Mooring by Hawaiian Independent

Refinery, and the fact that the HOUSTON had an 840 foot hose attached to its side, capable of wrapping itself around the ship's propeller and completely disabling the vessel, it will be quite clear that Captain Dick's navigation was the exclusive cause of the grounding.

How the Court could make a determination as to cause without considering all the factors at play the night of the grounding is a matter of some perplexity. In any event, Griffin's proposal begs the question. Comparative fault applies in cases of this sort, except when the trier of fact finds that losses can be attributed to separate causes. *Newby v. Kristen Gail*, 937 F.2d 1439, 1992 A.M.C. 149 (9th Cir. 1991).

United States v. Reliable Transfer Co. Inc., 421 U.S. 397, 1975 A.M.C. 541 (1975), abandoned the rule of divided damages in admiralty, and replaced it with comparative fault:

> We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. . . .
>
> 421 U.S. at 411.

Before the Court can determine whether comparative fault applies, it must hear the evidence concerning whether two or more parties contributed by their fault to cause damage.

Comparative fault principles also apply in strict products liability suits. *Pan-Alaska Etc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977).

Protectus Alpha v. North Pacific, 767 F.2d 1379 (9th Cir. 1986), relied upon by Griffin, merely holds that *when damages can be attributed to separate causes*, then comparative fault principles do not apply. First, however, there must be a factual determination that there are separate causes, as there was in the District Court in *Protectus*. To find the facts, the Court must conduct an evidentiary hearing on the relevant causation factors as discussed below, and would have to impanel a jury. Given those requirements, there certainly would be no expedition of the litigation from the bifurcation sought by Griffin.

In order to bifurcate on Griffin's terms, the Court would have to find as fact either (1) that Exxon's damages can be attributed to separate causes, or (2) that the master's alleged negligence was an intervening superseding cause.

In this case, in order to determine whether damages may be attributed to separate causes, the Court must first determine that the initial tortfeasors' various negligent acts and omissions had ceased to be an operating force at the time Exxon's master's alleged negligence came into play. *See e.g. Protectus Alpha v. North Pacific*, 767 F.2d 1379, 1986 A.M.C. 56 (9th Cir. 1985); *Kalland v. North American Van Lines*, 716 F.2d 570 (9th Cir. 1983); *Restatement (Second) of Torts* sec. 433A. The Court must therefore look at all the defendants' negligent acts and omissions, essentially all the evidence except as to damages. If the Court determines their negligence was not an operating force, and therefore the grounding was caused separately from the breakaway, there is no point in determining whether Exxon's master was negligent, because none of the Defendants will be liable.

Similarly, whether the master's alleged negligence is an intervening superseding cause, which would cut off Defendants' liability at the point of the intervening event, requires examination of all the claimed causes of the casualty. *See e.g. Hunley v. Ace Maritime Corp.*, ___ F.2d ___, 1991 A.M.C. 1217 (9th Cir. 1991); *White v. Roper*, 901 F.2d 501 (9th Cir. 1990); *Miss Janel Inc. and U.S. Fire Insurance Co. v. Elevating Boats, Inc. et al.*, 1989 A.M.C. 1870 (S.D. Ala. 1989); *Nat G. Harrison Overseas Corp. v. American Tug Titan*, 1975 A.M.C. 2257, 516 F.2d 89 (5th Cir. 1985); *Fosbre v. State of Washington*, 1967 A.M.C 1170, 424 P.2d 901 (Wash. 1967).

The Ninth Circuit follows the principles of the Restatement (Second) of Torts in determining whether an intervening act is a superseding cause which terminates the earlier tortfeasors' liability. *Hunley v. Ace Maritime Corp., supra.* Some factors to be considered are whether the intervening force in hindsight appears to be extraordinary rather than normal in view of the circumstances existing at the time of its operation, whether the intervening force brings about harm different in kind from that which would otherwise have resulted from the earlier tortfeasors' negligence, and the degree of culpability of the earlier tortfeasors who set the stage for the intervening force.

"An intervening negligent act will not supersede an actor's initial negligent conduct if the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent." *Hunley v. Ace Maritime Corp., supra.* Again, the Court would be required to look at all the evidence of negligence and other fault.

Bifurcation as requested by Griffin would not save time or expense, but would result in extreme prejudice to Exxon by eliminating consideration of evidence establishing the fault of the defendants. For all these reasons, Griffin's motion for bifurcation should be denied.

2. GOOD CAUSE HAS NOT BEEN SHOWN TO CONTINUE THIS TRIAL.

FRCP 16 provides that a scheduling conference order, once entered, may not be altered except upon a showing of good cause. Inability to complete discovery within the time limits set by the scheduling conference order does not constitute good cause unless the party requesting continuance has exercised good faith and due diligence to meet the deadline. See Advisory Committee Note to the 1983 Amendment to Rule 16. When a party allows several months to pass without taking any significant action to move discovery along, a request for continuance is not grounded on good cause. *See e.g.*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation),	Civil No. 91-00271 HMF
Plaintiffs,	(Filed Jul 31, 1992)
vs.	
PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.,	
Defendants.	
and	
PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC.,	
Third-Party Plaintiffs,	
vs.	
BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.,	
Third-Party Defendants.	

ORDER GRANTING MOTION TO BIFURCATE, DENYING CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING MOTION TO STRIKE THIRD-PARTY GRIFFIN WOODHOUSE, LTD.'S REPLY MEMORANDUM AND GRANTING MOTION, IN THE ALTERNATIVE, FOR LEAVE TO FILE RESPONSIVE MEMORANDUM

INTRODUCTION

On July 27, 1992, the court heard third-party defendant Griffin Woodhouse, Ltd.'s ("Griffin") motion to bifurcate or, in the alternative, to continue trial filed on June 3, 1992. Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc. (collectively "HIRI") filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 18, 1992. Defendant and third-party defendant Bridon Fibres and Plastics, Inc. ("Bridon") also filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 19, 1992. Defendant Sofec, Inc. ("Sofec") also filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 22, 1992. Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A. (collectively "Exxon") filed a memorandum in opposition on June 18, 1992. Griffin, in turn, filed a memorandum in reply on July 16, 1992. On July 24, 1992, Exxon filed a motion to strike Griffin's reply memorandum or, in the alternative, for leave to file responsive memorandum.

Bridon filed a cross-motion for partial summary judgment on June 18, 1992, which was joined by Sofec and Griffin on June 22, 1992, and by HIRI on June 23,

1992. Exxon filed a memorandum in opposition on July 7, 1992. Bridon, in turn, filed a memorandum in reply on July 16, 1992.

BACKGROUND

This case arises out of the March 2, 1989 breakaway of the EXXON HOUSTON, which was owned and operated by Exxon, from HIRI's single point mooring (SPM) at Barber's Point and subsequent grounding approximately three hours later. The breakaway occurred when a Type "C" chafe chain, which was used to connect the SPM to the EXXON HOUSTON, parted. Post-accident, destructive testing of the chain has indicated that the welds of the chain links *may* have been defective.

DISCUSSION

I. CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine

issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. *But cf., id.*, 477 U.S. at 328, 106 S.Ct. at 2555-56 White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468, *citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*[1]

B. Analysis

With its cross-motion, Bridon seeks a judgment on the pleadings that the parting of the Type "C" chafe chain, which connected the EXXON HOUSTON to the

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[1] For the purposes of deciding this motion, the court applies substantive admiralty law. With respect to the adoption and application of products liability law in admiralty cases, the Supreme Court and the Ninth Circuit have borrowed substantially from principals developed in "land-based" jurisprudence. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-75 (1986); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1133 (9th Cir. 1977).

SPM, was not the proximate cause of the grounding of the EXXON HOUSTON. According to Bridon, the testimony of the vessel's officers shows that, after the EXXON HOUSTON broke out from the SPM, the vessel had reached and remained at a point of safety for one hour and fifteen minutes before she left the safe area and drifted towards the shore, eventually grounding two hours and fifty minutes after the breakout. Bridon further contends that the "undisputed evidence on the record shows that the decision of the vessel's Master to stop the progress of the vessel along her course away from the shore was a voluntary decision made when the vessel was in no imminent danger and when he had ample time to reflect on possible courses of action." As such, Bridon argues that Exxon cannot establish a causal nexus or connection between the parting of the chafe chain and the subsequent grounding nearly three hours later.

At the time of the breakout, the EXXON HOUSTON was connected to the SPM by a mooring assembly, which included a Type "C" chafe chain, manufactured by Griffin and sold by Bridon, and by two oil hoses, eighteen inches (18") in diameter and eight hundred feet (800') long, which were mounted on the ship's manifold. The cause of the failure of the chafe chain and the resulting breakout is disputed.

Once the chafe chain parted, the master of the EXXON HOUSTON, Captain Dick, attempted to prevent the oil hoses from breaking by bringing the vessel's head to the SPM buoy. In spite of his efforts, one hose broke close to the ship, dangling harmlessly from the manifold, whereas the second hose tore at the buoy, with its entire

length remaining connected to the manifold. For the purpose of the motion, Bridon does not contest Exxon's claim that the second hose obstructed the navigation of the EXXON HOUSTON by preventing the vessel from proceeding ahead out of concern that the hose would become entangled in the propeller. Assuming this obstruction, the navigation of the EXXON HOUSTON was restricted to backward movement using astern propulsion.

Furthermore, Bridon assumes, for the purpose of the motion, that from the time of the breakout at approximately 1715 hours until 1803 hours, Captain Dick was attempting to gain control of the vessel. At 1803, Captain Dick set the vessel, moving astern, on a westerly course, roughly parallel to the coastline between Pearl Harbor and Barbers Point. Bridon's Memorandum in Support of Cross-Motion for Partial Summary Judgment, Exhibit B at 212-13, 233 (Deposition of Second Officer Hallock G. Davis, III) ("Davis Deposition"). At 1830 hours, it appears that the EXXON HOUSTON had cleared Barbers Point and was in some 100 feet of water.

The parties dispute, however, whether the EXXON HOUSTON could have continued on the same course until it was positioned far from the shoreline.[2] Although Exxon has admitted that there was no mechanical limitation on the capabilities of the vessel's engines which would have precluded her from continuing on her

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[2] Furthermore, the parties dispute whether the navigation or maneuvering of the EXXON HOUSTON that led to her grounding, *after* the hose had been disconnected, was negligent.

1803-1830 course, Captain Dick has testified that circumstances precluded him from continuing to navigate the EXXON HOUSTON offshore.

> Q. You said that it would be prudent to get further offshore, but the circumstances made it difficult to do so?
>
> A. That's true. . . .
>
> Q. Now, what circumstances are we talking about?
>
> A. The position of the hose, the wind, sea and swell conditions, the ship being able to only use astern propulsion because of the position of the hose.
>
> Q. Did these circumstances remain constant throughout the entire period from the breakaway up and to the grounding?
>
> A. No, they were ever changing, but always present.

Exxon's Memorandum in Opposition, Exhibit 1 at 374-75 (Deposition of Kevin P. Coyne, f.k.a. Kevin Dick)("Dick Deposition").

On the other hand, Second Officer Davis, who was responsible in part for the navigation of the vessel, testified that there was nothing to prevent Captain Dick from continuing on his westerly course – away from shore – proceeding astern.

> Q. Was the ship proceeding generally in a westerly direction from 1803 until 1830?
>
> A. That's correct.

Q. Do you know of any reason why the vessel, after 1830, could not have proceeded in the same direction?

A. No, I don't.

Q. Was – are you aware of any necessity for change of direction of the vessel at – after 1830?

A. Not that I can recall.

Davis Deposition at 233-35; *see also* Exxon's Memorandum in Opposition, Exhibit 2 at 318 (Deposition of Steve Marvin, HIRI's mooring master) (describing "beautiful" ease with which the EXXON HOUSTON was able to proceed astern). The vessel allegedly remained in the general vicinity of its 1830 position, southwest of Barbers Point, for one hour and fifteen minutes, until 1948 hours, during which time the crew was disconnecting the oil hose. In the process, the hose damaged the vessel's crane and put its operator into danger, requiring the assistance of other crew members. At 2006 hours, the vessel grounded.

It is elementary that Exxon has the burden of proving that the breakout of the vessel from her mooring was the proximate cause of the grounding. 1 Am. Law Prod. Liab.2d *Proximate Causation* § 4:3 (1987); 63 Am. Jur.2d *Products Liability* §§ 261, 264 (1984). Proximate causation is defined as "that cause which, in a natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred." 1 Am. Law Prod. Liab.3d *Products Liability* § 4:1 (1887); *see generally Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 n.1, 1991 A.M.C. 1217

(9th Cir. 1991) (citing Restatement (Second) of Torts on relevant factors used to determine whether intervening force is superseding cause). To prove that the failure of the Type "C" chafe chain proximately caused the grounding, Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of the grounding. *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982).[3]

The Court of Appeals for the Ninth Circuit has adopted the Restatement (Second) of Torts for the elements of a defense of superseding cause. *Hunley v. Ace Maritime Corp., supra.*

> The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:
>
> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the operation;

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[3] Where the relevant facts show that the causal connection between the defendant's negligence and the plaintiff's injury is remote, the question of causation is decided by the court as a matter of law. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3d Cir. 1990); *see also Rexall Drug Co. v. Nihili*, 276 F.2d 637, 645 (9th Cir. 1960) (proximate cause becomes a question of law if evidence is insufficient to raise reasonable inference that act complained of was proximate cause of injury).

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or was not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the th'.d person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts § 442. In support of its motion, Bridon writes that the court need not determine whether any negligence on the part of Captain Dick created such an intervening force; instead, Bridon relies on the (disputed) fact that the EXXON HOUSTON reached a "point of safety" to establish a superseding cause of the grounding. Bridon refers the court to *V/O Exportkhleb and Insurance Co. of U.S.S.R. (Ingosstrakh) Ltd. v. S.S. William A. Reiss*, 1983 A.M.C. 782 (1982) (E.D. Ohio 1982) for the proposition that "when a vessel which successfully avoids a collision or other emergency, and after having reached a point of safety, goes aground, the initial negligence of the other vessel which had placed the grounded vessel in danger is extinguished as a proximate cause of the grounding." Bridon's Memorandum in Support of Motion for Partial Summary Judgment at 13.

Even though Bridon has pled its case persuasively, the motion must be denied. First, there is a material issue

of disputed fact as to whether Captain Dick was responding to or struggling with the consequences of the breakout, and the attendant, changing circumstances of the rough seas, from the time of the breakout up until the time of the grounding. *See* Restatement (Second) of Torts §§ 443 and 445 (explaining that actions taken in consequence to situation created by negligent conduct are not superseding cause of harm). Because of the conflicting testimony on the capacity of the EXXON HOUSTON to proceed astern, and farther off shore, the issue of causation is not appropriate for summary adjudication at this stage.

Second, Bridon's characterization of the law in this area is only partially accurate. In *V/O Exportkhleb*, the plaintiff's ship went aground five to six *minutes* after it had narrowly avoided colliding with the defendant's vessel. The district court held that, because the shallow waters were not thrust upon the plaintiff's ship suddenly and the plaintiff had ample opportunity to avoid the danger, the plaintiff's *negligence* after the passing was the proximate cause of the grounding. As such, in order to find that the navigation of the EXXON HOUSTON was a superseding cause of the grounding, this court would be required to find that Captain Dick's actions, in arresting the movement of the vessel at 1830 and, subsequently, in maneuvering the vessel, were, in fact, negligent.[4] *See*

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[4] According to Bridon, once the EXXON HOUSTON was in a safe position in deep water for over one hour, any forces that may have initially been set in motion by the parting of the chafe chain had long since been extinguished. In this regard, Bridon appears to rely on the doctrine of *res ipsa loquitur* – the grounding must have resulted from the (negligent) navigation of the

Dougherty v. United States, 207 F.2d 626, 630, 1953 A.M.C. 1541, 1547 (3d Cir. 1953), *quoted in V/O Exportkhleb*, 1983 A.M.C. at 739. It is not enough, for the purpose of breaking the chain of events set in motion by the breakout, for the court to find that the EXXON HOUSTON had reached a point of safety.

The court would also note that the negligence standard required to establish a superseding cause is higher than in ordinary circumstances. As the Restatement (Second) of Torts instructs:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if
>
> (a) the actor at the time of his negligent conduct should have realized that a third person might so act, *or*
>
> (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, *or*
>
> (c) the intervening act is a normal consequence of a situation created by the actor's conduct and *the manner in which it is done is not extraordinarily negligent*.

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vessel. As discussed above, a finding that the navigation of the vessel was the superseding cause of the grounding must be predicated on a finding of negligence.

Restatement (Second) of Torts § 447 (emphasis altered). The evidence presented in the record is clearly insufficient to support a finding by this court, on summary judgment, that the navigation of the EXXON HOUSTON by its master was negligent, least not extraordinarily so.

Accordingly, the motion for partial summary judgment is DENIED.

II. MOTION TO BIFURCATE OR IN THE ALTERNATIVE, TO CONTINUE TRIAL

Griffin seeks to bifurcate the issue of causation, as between the breakout and the post-breakout navigation of the EXXON HOUSTON, from the other liability issues in the case – that is, the extent to which the master's navigation of the EXXON HOUSTON caused its grounding on March 2, 1989. Griffin asserts that bifurcation could obviate the need for extensive discovery, trial preparation, and weeks of trial if the court first determines the cause or comparative causes of the grounding, excluding the cause of the breakout. In this regard, Griffin suggests that such an inquiry is discrete and much simpler for adjudication than the cause of the breakout itself.

According to the Marine Casualty Report submitted by Exxon following the accident, the damages alleged by Exxon for the loss of the EXXON HOUSTON amounts to approximately eighty percent (80%) of the total damages claim. *Assuming* that these damages are resolved or allocated in the first phase of a bifurcated trial, Griffin and the other defendants assert that the parties will likely settle the remaining twenty percent (20%) of claimed damages. Exxon disputes these estimates. The court need

not, however, resolve this dispute as a predicate to deciding the motion to bifurcate.

The court has broad discretion to order separate trials pursuant to Rule 42(b) of the Federal Rules of Civil Procedure when a separate trial will further convenience, avoid prejudice or "be conducive to expedition and economy." *See Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1517 (9th Cir. 1985); *Airlift International v. McDonnel Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982). Here, a separate trial offers the probability of settlement after the conclusion of the first phase in the opinion of every defendant. Only Exxon holds to the contrary. Additionally, if the court determines that the navigation of the EXXON HOUSTON was the proximate cause of its grounding, then it would be unnecessary for the court to resolve the issue of "comparative fault." *See Protectus Alpha Navigation v. North Pacific Grain Growers Ass'n*, 767 F.2d 1379 (9th Cir. 1986). In *Protectus*, the plaintiff's ship caught fire while moored at the dock. The defendants employees apparently panicked and negligently cast the ship adrift whereafter the ship was destroyed by fire because the fire fighters could not reach her. In affirming the trial court's disposition, the Court of Appeals for the Ninth Circuit explained why a determination of comparative fault was unnecessary.

> The [district] court found that 92.5% of the loss was sustained after the ship was set adrift, and therefore attributed that percentage of liability to [defendant] North Pacific.
>
> Appellant [North Pacific] contends that the district court erred in ignoring principles of

> comparative negligence and apportioning damages based upon its view of causation, rather than culpability. . . .
>
> However, as [plaintiff] Protectus points out, there is no shipowner negligence to "compare." Even if Protectus were negligent in causing the fire, such negligence had ceased to be an operating force when the vessel was cast off by North Pacific's employees. The testimony of each expert and fireman who viewed the fire that night was that the fire would have been put out in fifteen to twenty minutes had the vessel not been cast off. . . .
>
> Where injuries can properly be apportioned to separate causes based on evidence in the record, there is no occasion to invoke the doctrine of comparative negligence . . The whole point of comparative negligence is that the relation between injury and cause cannot be accurately determined, and an allocation based on the degree of negligence of each party becomes the measure of liability.

767 F.2d 1383-84; *see also Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1992 A.M.C. 149 (9th Cir. 1991) (comparative fault inapplicable where trier of fact concludes that losses can be attributed to separate causes).

On the other hand, if the court does not find that the navigation of the vessel was the superseding cause of the grounding, the court can still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.E.2d 251 (1975). As

discussed earlier, a determination of whether the master's alleged negligence is an intervening, superseding cause, which would cut off defendants' liability at the point of the intervening event, requires an examination of all the claimed causes of the casualty. *See Hunley v. Ace Maritime Corp.*,927 F.2d 493, 1991 A.M.C. 1217 (9th Cir. 1991); *White v. Roper*, 901 F.2d 501 (9th Cir. 1990).

The court is well aware of the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury. The court, however, is in the best position to determine whether bifurcation *in this case* promotes judicial economy. The court finds that it does.

Accordingly, the motion to bifurcate is GRANTED so that the first phase of the trial will be limited to the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself.[5]

Finally, the court must address Exxon's motion to strike Griffin's reply memorandum or, in the alternative, for leave to file responsive memorandum. After reviewing Griffin's moving papers, the court does not find that Griffin changed its position vis-a-vis the scope of the first phase of the bifurcated trial in a manner that would violate Local 220-4. Nevertheless, the court, in its discretion, will permit Exxon to file the responsive memorandum attached as an exhibit to its motion. Exxon should be

[5] Having granted the motion to bifurcate, the court does not address the motion, in the alternative, to continue trial.

advised that the court has carefully reviewed and considered the proposed filing in connection with its ruling on the motion to bifurcate.

Accordingly, the motion to strike is DENIED and the motion, in the alternative, for leave to file responsive memorandum is GRANTED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 31, 1992

/s/ Harold M. Fong
UNITED STATES
DISTRICT JUDGE

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A division of Exxon corporation) vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.; PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC. vs. BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.

Civil No. 91-00271 HMF

ORDER GRANTING MOTION TO BIFURCATE, DENYING CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING MOTION TO STRIKE THIRD-PARTY GRIFFIN WOODHOUSE, LTD.'S REPLY MEMORANDUM AND GRANTING MOTION, IN THE ALTERNATIVE, FOR LEAVE TO FILE RESPONSIVE MEMORANDUM

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
(Filed Aug. 10, 1992)

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs,	CIVIL NO.: 90-00271 HMF IN ADMIRALTY
vs.	
PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC., Defendants,	NOTICE OF PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER GRANTING MOTION FOR BIFURCATION, FILED JULY 31, 1992; PLAINTIFFS' MOTION; MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION; AFFIDAVIT OF JUDY S. GIVENS; EXHIBITS "1" and "2"; CERTIFICATE OF SERVICE
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC., Third-Party Plaintiffs,	

vs.	Date: July 27, 1992
BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC., Third-Party Defendants.	Time: 3:45 p.m. Judge Harold M. Fong

NOTICE OF PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER GRANTING MOTION FOR BIFURCATION, FILED JULY 31, 1992

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NOTICE IS HEREBY GIVEN that on August 10, 1992, the undersigned filed with the above-entitled Court a Motion for Clarification of Order Granting Motion for Bifurcation. Any response to said Motion must be filed with the Court no later than eleven (11) days after having been served with a copy thereof.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC., Defendants,	CIVIL NO.: 90-00271 HMF IN ADMIRALTY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLARIFICATION OF ORDER GRANTING MOTION FOR BIFURCATION, FILED JULY 31, 1992

PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC., Third-Party Defendants.	

MEMORANDUM IN SUPPORT OF MOTION FOR CLARIFICATION OF ORDER GRANTING MOTION FOR BIFURCATION. FILED JULY 31, 1992

I. INTRODUCTION

The Court's Order for separate trial of part of the causation issues has been interpreted differently by the parties. There are substantial disputes as to what evidence will be admissible and which issues will be tried in the bifurcated phase. Plaintiffs move therefore for clarification, seeking to avoid further discovery disputes.

As plaintiffs understand the Order, they will be able to introduce all evidence pertaining to the cause of the grounding. The chafe chain failure would be considered as a cause of the grounding, but no evidence concerning the cause of the chain's failure would be admissible at the

first trial, and no determination as to the cause of the chain's failure would be made at the conclusion of the first trial. If the failure of the chain is found to have been a cause of the grounding, the cause of the failure would be tried later.

Conversely, plaintiffs have gained the impression that the defendants are of the opinion that only navigation issues will be tried, i.e. whether the master of the vessel was himself negligent. *See*, for example. Exhibits "1" and "2".

Plaintiffs contend that the language of the Order supports their interpretation, and also that no determination of the legal cause of the grounding can be made if only the master's navigation is considered.

There is no claim, no defense, and no issue that can be adjudicated to completion by considering only the master's navigation.

Plaintiffs have claimed breach of warranty and negligence against the HIRI defendants. They have claimed strict liability in tort against Sofec. Each cause of action is based upon a legal relationship between plaintiffs and a defendant. Without a determination of the legal relationships, there can be no determination of the appropriate standard of care to be applied. There can be no determination of proximate cause without a determination of the standard of care.

Because the determination of legal cause requires application of standards of care, plaintiffs must be given the opportunity to prove that the HIRI defendants should

be judged in light of their roles as safe berth warrantor, wharfingers, and contractors for services to the vessel.

Likewise, plaintiffs must be given the opportunity to prove that Sofec's acts and omissions should be judged in light of its status as the manufacturer of a defective product.

The evidence necessary to establish the status of the defendants, and thus their respective duties, includes matters which preceded the breakaway.

Once the duties of the parties have been established, the trier of fact must determine whether those duties were breached, and whether the breaches caused plaintiffs' losses. In most cases, the breaches which plaintiffs' contend caused its losses preceded the chain failure.

Thus, no determination of cause, other than, possibly, whether the master's navigation was *a* cause in fact of the grounding, can be made by considering only evidence of the master's navigation.

II. DISCUSSION

A. THE LANGUAGE OF THE ORDER SUPPORTS PLAINTIFFS' INTERPRETATION.

The Order states:

> . . . the motion to bifurcate is GRANTED so that the first phase of the trial will be limited to the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself.

p. 16.

It is difficult to understand how that language could be interpreted to mean that evidence will be limited to the Master's navigation following the breakout.

In its discussion, the Court did state:

> On the other hand, if the court does not find that the navigation of the vessel was the superseding cause of the grounding, the court can still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel.
>
> Order, page 15.

Defendants apparently base their interpretation of the Order on this language.

B. THE TRIER OF FACT CANNOT DETERMINE CAUSE WITHOUT CONSIDERING MATTERS BEYOND THE MASTER'S NAVIGATION OF THE VESSEL.

While the Order does not state that it is the legal cause, rather than physical cause, of the grounding that is to be determined in the first phase of the trial, plaintiffs assume that to be the Court's intention.

Proximate cause requires an examination of the acts of the parties in light of their responsibilities.

As noted by the Court of Appeals for the Ninth Circuit:

> [Legal, or proximate, cause is] not primarily one of causation at all, since it does not arise until

> cause in fact is established. It is rather one of the policy as to imposing legal responsibility." (quoting W. Keeton, D. Dobbs & D. Owen, *Prosser & Keeton on Torts*, § 42). (further citations omitted.) In short, "we are dealing with problems of responsibility, and not physics." *Prosser & Keeton* § 44 at 302.

Hunley v. Ace Maritime 927 F.2d 493, 497 (9th Cir. 1991).

In order to determine the appropriate standard to apply in imposing legal responsibility, the trier of fact must determine whether plaintiffs have met their burdens of proof as to their breach of warranty, strict liability in tort, and negligence claims.

The Court has apparently equated comparative fault with cause. Comparative fault, by its very definition, is not equivalent to causation. It applies unless the degree to which a particular act caused a loss can be determined. *Newby v. Kristen Gail*, 1992 AMC 149 at 154 (1991); *Protectus Alpha v. North Pacific* 1986 AMC 56 at 61 (1985).

Comparative fault is applied differently in connection with strict liability claims than with negligence claims. Because plaintiffs have negligence claims as well as strict liability claims, the trier of fact must consider the culpability of the parties before it can determine comparative fault.

1. EVIDENCE RELEVANT TO STRICT LIABILITY CLAIMS.

Plaintiffs' claims of breach of warranty and product liability do not require proof of wrongful conduct on the

defendants' part. Once plaintiffs have shown the existence of the duty, the breach of the duty, and the resultant loss, the defendants will have an opportunity to try to establish that the award of damages should be reduced in proportion to plaintiffs' alleged contribution to their loss. *Pan-Alaska v. Marine Construction*, 565 F.2d 1129, 1978 AMC 2315 (9th Cir., 1977).

In *Pan-Alaska* the Ninth Circuit ruled that where a defendant is found liable under a theory of strict products liability, and a plaintiff is found contributorily negligent in causing his loss, the doctrine of comparative fault can be applied as a partial defense. *Id.* at 2327.

The *Pan-Alaska* court ruled that if the plaintiff proved its case on remand, the defendant would be strictly liable for harm caused by a defective product, except that the damages could be reduced in proportion to the plaintiff's contribution to his loss. *Id.* at 2330. In evaluating the plaintiff's contribution, the court ruled, all of plaintiff's conduct should be considered, and its blameworthiness compared to the extent of the product's defect. *Id.* at 2331.

Logically, a similar approach would have to be taken in applying comparative fault as to plaintiffs' claims of breach of warranties.

In order to prove their claim of strict liability in tort, plaintiffs must also be given an opportunity to show that Sofec had the duty to plaintiffs as the manufacturer or a product, under §402-A of the *Restatement of Torts*, 2d. Plaintiffs must show Sofec's status as the manufacturer and seller of the SPM, the defects in the SPM, the lack of

material alteration in the product, and the causal connection with plaintiffs' loss. Again, the evidence will necessarily include matters which preceded the failure of the chain.

In order to prove their claims of breach of warranty of safe berth, plaintiffs will have to establish the terms of the contract extending the warranty of safe berth, its breach, and the causal connection with plaintiffs' loss.

As safe berth warrantor, the HIRI defendants had the strict contractual duty to provide a berth that was safe under all foreseeable conditions. Plaintiffs claim that the failure of the chain was a breach of the warranty, and proof of the failure in foreseeable conditions, though not necessarily the cause of the failure, will be required. Evidence in support of plaintiffs' claim that other conditions at the berth breached the warranty will also have to be considered.

Evidence of the advice given to the HIRI defendants by experts well before the breakaway, as well as evidence of the information available to the HIRI defendants from trade publications, must be considered in connection with the issue of foreseeability.

The defendants will undoubtedly offer evidence in an attempt to prove that plaintiffs' contributed in some manner to their loss. The standard of care applicable to the captain in connection with defendants' claims of contributory negligence is also dependent upon the duty of care owed to the vessel by the defendants. Plaintiffs' conduct will have to be judged in light of their right to rely upon the warranty of safe berth. *Paragon Oil Co. v. Republic Tankers, S.A.* 310 F.2d 169 (2d Cir 1962). If the

captain was reasonable in relying upon a safe berth warranty, his duty of care was less. *Id.* The captain's standard of care is also affected by whether the vessel was placed in *extremis* by the defendants. *The Oregon* 158 U.S. 186 (1895); *The Genesee Chief v. Fitzhugh* 53 U.S. 443 (1851).

If defendants are successful in establishing that plaintiffs contributed to their loss, the damages awarded plaintiffs will be reduced in proportion to plaintiffs' fault.

2. EVIDENCE RELEVANT TO PLAINTIFFS' CLAIMS OF NEGLIGENCE

In order to prevail on their negligence claims, plaintiffs must prove culpable conduct on the part of one or more HIRI defendants. The defendants have alleged negligent conduct on the plaintiffs' part, which, if proved, would reduce plaintiffs damages on a comparative fault basis.

In order to determine comparative fault in connection with the plaintiffs' negligence claims, the Court must consider the *culpability* of the parties. *United States v. Reliable Transfer Co.* 1975 AMC 541 (1975); *Newby v. F/V Kristen Gail, supra; Pan-Alaska v. Marine Const. & Design Co.* 565 F.2d 1129, 1978 AMC 2315 (9th Cir., 1977).

Before any determination can be made concerning plaintiffs' negligence claims, the trier of fact must determine HIRI's legal duties toward the plaintiffs. Only then can the Court determine the appropriate standard of care to be applied to HIRI's conduct and whether the conduct met that standard of care.

As wharfinger, the HIRI defendants had a duty to use due diligence to ensure a safe berth. As a contractor for services to the vessel, the HIRI defendants had a duty to perform in a workmanlike manner. Plaintiffs must be given an opportunity to proof [sic] the relationships between themselves and the various HIRI defendants. They must also be given a opportunity to establish the conduct necessary to meet the standards of care associated with the HIRI defendants' roles.

Once the legal duties are established, plaintiffs must be given an opportunity to show the breach of those duties. Thereafter, defendants will probably seek to establish wrongful conduct on the part of the plaintiffs. Only with all the evidence pertaining to the culpability of the parties before it can the trier of fact then determine whether plaintiffs' damages should be reduced on a comparative fault basis.

Evidence relevant to plaintiffs' negligence claims will include the advice and information provided to the HIRI defendants as that advice and information pertains to their conduct, and all of their acts and omissions to the extent they influenced events that followed the failure of the chafe chain. Without an understanding of the HIRI defendants' acts during the design, procurement and pre-incident operation periods, no evaluation of their *negligence* can be made.

The trier of fact must consider all the problems with the trailing hose and who was responsible for it, the role and performance of the mooring master and his relationship to the ship, whether the mooring master was adequately trained, the lack of a contingency plan setting

forth options in the event of bad weather or a mooring failure, the inadequacy of the assist boats, and the existence of and reliance on a safe berth warranty. Defendants will presumably seek to introduce evidence concerning plaintiffs' allegedly wrongful conduct.

3. EVIDENCE RELEVANT TO DEFENSES OF SUPERSEDING CAUSE AND SEPARATE CAUSE

Defendants have asserted that the grounding resulted from a separate cause or a superseding cause. The Court denied Bridon's Cross Motion For Partial Summary Judgment, finding that Bridon had not established as a matter of law either separate cause or superseding cause. Thus, evidence concerning those defenses must be considered in determining the cause of the grounding.

As recognized in *Hunley v. Ace Maritime Corp.* 927 F.2d 493 (9th Cir. 1991) and by this Court, intervening superseding cause may only be proved if the captain was extraordinarily negligent and his negligence and resulting damages were not normal or foreseeable consequences of the initial torts committed.

Plaintiffs assert that the chain failure, the trailing hose, the mooring master's advice and later absence, the lack of any contingency plan, the inadequacy of the defendants' response to the breakout, the lack of adequate assist vessels, and the defects in the SPM, both known and unknown by HIRI, were all causes of the grounding. Evidence of all of those causes, and the HIRI defendants' culpability as to each of them, along with the

foreseeable consequences of those torts, must be considered.

Evidence of environmental conditions at the berth will be relevant to the issue of what consequences were foreseeable. The mooring master's training and advice must also be considered. The characteristics and actions of the assist vessel and its crew, as well as HIRI's shoreside personnel, must considered. The trailing hose, and the danger it posed, is relevant to a determination of superseding cause.

Another complete defense urged by the defendants is separate cause. To prove separate cause, defendants must show all negligent or otherwise legally culpable forces attributable to any or all the defendants had *ceased to operate* at the time the damage occurred. *See Protectus Alpha Navigation v. North Pacific Grain Growers Ass'n.*, 767 F.2d 1379 (9th Cir. 1986).

Here, again, in order to determine whether causes attributable to the defendants caused the grounding, the trier of fact must determine the natural and probable consequences of the defendants' conduct, including all the evidence considered in connection with the defense of superseding cause.

IV. IT IS UNCLEAR WHETHER THE FIRST PHASE OF BIFURCATION WILL BE TO A JURY.

Plaintiffs do not take any position at this time as to whether Defendant Sofec is entitled to a jury trial of all the issues in this litigation. However, it does not appear

that Sofec has conceded to a nonjury trial in the first phase of bifurcation.

Sofec has filed a Statement of Clarification that states it would waive jury trial in the first phase if the case is bifurcated *temporally* before and after the point of the breakaway. However, it is evident from the Court's Order granting the motion to bifurcate, and from the discussion above, that plaintiffs will be able to introduce evidence of fault on the part of Sofec that occurred before the breakaway. It seems, therefore, that a jury would have to be impanelled for the first phase.

IV. CONCLUSION

Plaintiffs seeks clarification that the only issues and evidence to be excluded from the first phase of a bifurcated trial are those pertaining to damages and the cause of the chain breaking. Such a bifurcation will exclude a great deal of expert testimony, thereby saving both the Court and the parties time and expense in the first phase.

It is requested the clarifying Order specifically state that all evidence of all claimed causes of the grounding will be admitted, that all evidence necessary to prove breach of warranty of safe berth and strict products liability be admitted, and that all evidence of the degree of culpability of each party in causing the grounding also be admitted.

Plaintiffs also requests that the Order state the following evidence is admissible : (1) all evidence concerning the contractual relationship between plaintiffs and

the HIRI defendants; (2) all evidence concerning the services and the quality of those services the HIRI defendants provided to plaintiffs and their vessel; (3) all evidence concerning the training, duties, and conduct of the mooring master and his relationship to the vessel; (4) all evidence concerning the adequacy of the design, operation, maintenance and physical components of the SPM, excluding only the chain; and (5) all information given by the HIRI defendants to plaintiffs and relied upon by the vessel master in making navigational decisions; and (6) all evidence in support of plaintiffs' claim against Sofec pursuant to § 402-A of the *Restatement of Torts, 2d* except for evidence of the cause of the chafe chain failure.

Finally, plaintiffs seeks clarification as to whether the bifurcated phase will be tried to a jury, and whether trial of remaining liability issues will commence immediately following the verdict in the first phase.

DATED: August 10, 1992; Honolulu, Hawaii.

/s/ Judy S. Givens
JUDY S. GIVENS
Of Attorneys for
Plaintiffs
EXXON SHIPPING
COMPANY, INC.
and EXXON COMPANY,
U.S.A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC., Defendants, PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC., Third-Party Defendants.	CIVIL NO.: 90-00271 HMF IN ADMIRALTY AFFIDAVIT OF JUDY S. GIVENS; EXHIBITS "1" AND "2"

AFFIDAVIT OF JUDY S. GIVENS

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

JUDY S. GIVENS, being first duly sworn upon oath, deposes and states as follows:

1. I am an attorney licensed to practice law before this Court and am one of the attorneys for Plaintiffs in the above entitled action.

2. I make each of the following statements based on personal knowledge unless otherwise expressly indicated.

3. Attached hereto as Exhibit "1", is a true and correct copy of Defendant SOFEC, INC.'s Statement of Clarification Re: Demand for Jury Trial; Certificate of Service.

4. Attached hereto as Exhibit "2", is John R. Lacy's letter to Judy S. Givens, Esq., dated August 6, 1992.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Judy S. Givens
JUDY S. GIVENS

Subscribed and sworn before me this 10th day of August, 1992.

/s/ Illegible
Notary Public, State of Hawaii
My commission expires: 11-25-94

EXHIBIT "1"

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC., Defendants,	CIVIL NO. 90-00271 HMF DEFENDANT SOFEC, INC.'S STATEMENT OF CLARIFICATION RE: DEMAND FOR JURY TRIAL; CERTIFICATE OF SERVICE (Filed Jul. 30, 1992) Trial Date: October 13, 1992

PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC.,

Third-Party Plaintiffs,

vs.

BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.,

Third-Party Defendants.

DEFENDANT SOFEC INC.'S STATEMENT OF CLARIFICATION RE: DEMAND FOR JURY TRIAL

Comes now, Defendant SOFEC Inc. ("Sofec"), by and through its attorneys, McCorriston Miho & Miller, and for clarification of its demand for jury trial, states that if this matter were bifurcated temporally on issues before and after the point of the breakaway of the *Exxon Houston* from its mooring at the Single Point Mooring ("SPM") owned and operated by Defendant HAWAIIAN INDEPENDENT REFINERIES INC. ("HIRI") as requested by Third-Party Defendant GRIFFIN WOODHOUSE LTD. in its Motion for Bifurcation or in the Alternative to Continue Trial filed on June 3, 1992 and which was heard before this Court on July 27, 1992, Sofec waives any right it may have with respect to a jury trial on issues of causation after the point of the breakaway. Sofec reserves

its right to a jury trial on issues of causation arising prior to and up to the actual point of breakaway of the *Houston* from the HIRI SPM.

DATED: Honolulu, Hawaii, Jul 30, 1992.

/s/ Randall K. Schmitt
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SOFEC, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation, Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC. Defendants, vs. PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC., Third-Party Defendants.	CIVIL NO. 90-00271 HMF CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by hand delivery/mail to the following counsel on JUL 30 1992.

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DATED: Honolulu, Hawaii, JUL 30 1992.

/s/ Randall K. Schmitt
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BRAD S. PETRUS
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EXHIBIT "2"

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[Names Omitted In Printing]

August 6, 1992

Judy S. Givens, Esq.
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RE: Exxon Shipping vs. Pacific Resources, et al.

Dear Judy:

This will acknowledge your August 6, 1992 letter. In my view, Judge Fong's decision was intended to limit the first trial to navigation issues. The purpose of my motion was to limit future discovery to activity occurring after the breakaway of the Exxon Houston from the mooring. The multitude of other issues including such things as breakaway couplings, SPM design, metallurgy, etc. are in my view not relevant to Captain Dick's navigation of the vessel once he was away from the buoy on March 2.

I realize Exxon will attempt to defend Captain Dick by pointing to the trailing hose but I view that as nothing

more than a defense to his conduct. Why a trailing hose was present is not relevant to the navigation issue. The core issue for the first trial is whether Captain Dick acted prudently under the circumstances which would include at least for a portion of the time the trailing hose. I can understand why Exxon would promote trying to bring in other issues since it is now faced with the difficult task of defending Captain Dick's conduct. However, I would also suggest that it is in Exxon's economic interest to have the navigation issue resolved quickly and as inexpensively as possible so that the parties can better frame the settlement issues in this case.

On behalf of Griffin Woodhouse I will have to oppose any effort by Exxon to expand the scope of the first trial. I hope Exxon will reconsider its decision to place additional burdens on the Court as well as the parties by asking for an expansion of the issues to be determined at the first trial.

Very truly yours,

/s/ John
John R. Lacy

JRL:set

cc: All counsel

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC.; PRI INTERNATIONAL, INC.; and SOFEC, INC., Defendants. and PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC, and PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD.; GRIFFIN WOODHOUSE, LTD. and WERTH ENGINEERING, INC., Third-Party Defendants.	Civil No. 90-00271 HMF (Filed Aug. 27, 1992)

ORDER DENYING PLAINTIFFS' MOTION FOR CLARIFICATION

On July 31, 1992, the court entered an order granting defendants' motion to bifurcate. On August 10, 1992, plaintiffs Exxon Shipping Company and Exxon Company, U.S.A. (collectively "Exxon") filed a motion for clarification of the July 31, 1992 Order. Defendant Sofec, Inc. ("Sofec") filed a memorandum in opposition on August 13, 1992; defendant and third-party defendant Bridon Fibres and Plastics, Ltd. ("Bridon") filed a memorandum in opposition on August 17, 1992; third-party defendant Griffin Woodhouse, Ltd. ("Griffin") filed a memorandum in opposition on August 18, 1992; and defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc. (collectively "HIRI") filed a memorandum in opposition on August 19, 1992. Exxon filed a memorandum in reply to Bridon's opposition memorandum on August 20, 1992, and filed memoranda in reply to the remaining opposition memoranda on August 21, 1992.

By its motion, Exxon moves the court to clarify its previous Order, issued on July 31, 1992, so that the first phase of the trial would contemplate all evidence related to the cause(s) of the grounding of the EXXON HOUSTON other than the evidence related to the cause of the parting of the Type "C" chafe chain. The court, however, bifurcated the trial so that it could consider the conditions that existed and the events that occurred after the breakout separately from those that preceded the breakout. It should have been clear from the July 31, 1992 Order that all evidence related to the conditions that existed and the events that occurred after the breakout

will be admissible in the first phase of the bifurcated trial. In its July 31, 1992 Order, the court employed the term "breakout" to refer to the moment at which the second oil hose connecting the EXXON HOUSTON to the SPM broke.

Accordingly, the motion for clarification is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, AUG 27 1992

/s/ Harold M. Fong
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC.; PRI INTERNATIONAL, INC.; and SOFEC, INC., Defendants. and PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC, and PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD.; GRIFFIN WOODHOUSE, LTD. and WERTH ENGINEERING, INC., Third-Party Defendants.	Civil No. 90-00271 HMF

ORDER GRANTING IN PART DEFENDANTS PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE INC. AND PRI INTERNATIONAL, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART PLAINTIFFS EXXON SHIPPING COMPANY, INC. AND EXXON COMPANY, U.S.A'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Oct. 9, 1992)

INTRODUCTION

On September 21, 1992, the court heard plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s (collectively "Exxon") motion for partial summary judgment against defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine Inc. and PRI International, Inc.'s Motion for Partial Summary Judgment (collectively the HIRI defendants) filed on August 3, 1992. Exxon filed a supplemental memorandum on August 17, 1992. Griffin Woodhouse, Ltd. ("Griffin") filed a statement of no position on August 26, 1992. The HIRI defendants filed a memorandum in opposition on September 3, 1992. Exxon filed a memorandum in reply on September 10, 1992. Bridon Fibres & Plastics, Ltd. ("Bridon") filed a statement of no position on September 15, 1992, and Sofec, Inc. ("Sofec") filed a statement of no position on September 17, 1992; [sic]

On September 21, 1992, the court also heard the HIRI defendants' motion for partial summary judgment filed on August 5, 1992. Sofec filed a joinder in the motion on August 28, 1992. Exxon filed a memorandum in opposition on September 3, 1992. Griffin filed a statement of no position on August 26, 1992. The HIRI defendants filed a

memorandum in reply on September 10, 1992. Bridon filed a statement of no position on September 15, 1992, and Sofec filed a statement of no position on September 17, 1992. In response to the court's instruction made on September 22, 1992, Exxon and the HIRI defendants filed supplemental memoranda on September 25, 1992.

BACKGROUND

This case arises out of the March 2, 1989 breakaway of the EXXON HOUSTON, which was owned and operated by Exxon, from HIRI's single point mooring (SPM) at Barber's Point and subsequent grounding approximately three hours later. The breakaway occurred when a Type "C" chafe chain, which was used to connect the SPM to the EXXON HOUSTON, parted. Post-accident, destructive testing of the chain has indicated that the welds of the chain links *may* have been defective.

DISCUSSION

I. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it

believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986)). The movant need not advance affidavits or similar materials to negate the existence of an issue on which the opposing party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 906 S. Ct. at 2553.

If the moving party meets its burden, then the opposing party must come forward with "specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Fed. R. Civ. P. 56(e); *T.W. Elec.*, 809 F.2d at 630. The opposing party cannot stand on the pleadings nor simply assert that it will discredit the movant's evidence at trial. *Id.* "If the factual context makes the [opposing] party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch. Bldg. Prods. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986)).

The standard for summary judgment reflects the standard governing a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986)). When there is a genuine issue of material fact, "the judge must assume the truth of the evidence set forth by the [opposing] party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.*

II. EXXON'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST HIRI

By its motion, Exxon seek [sic] "an order holding, as a matter of law, that (1) PRII [PRI International, Inc.] extended an express contractual warranty of safe berth to the EXXON HOUSTON and ESC [Exxon Shipping Company], (2) that HIRI [Hawaiian Independent Refinery, Inc.] and PRI are also bound by the express contractual warranty of safe berth in the relevant contact between Exxon Corporation and PRII, and (3) that the warranty was breached upon the breaking of the chafing chain on March 2, 1989." Memorandum in Support of Motion for Partial Summary Judgment at 3-4.

As a preliminary matter, the court would observe that Exxon's motion seeks to assign liability for the breakout to HIRI. The court's July 31, 1992 Order bifurcated the trial into two phases – pre-breakout and post-breakout – in order to resolve the post-breakout issues first. As such, the court declines to consider which party is legally responsible for the breakout until after the first phase of the trial has been completed. Nevertheless, the court must determine whether a warranty of safe berth remained in force and effect following the breakout insofar as such warranty would bear on the court's consideration of post-breakout issues.

Exxon contends that PRII extended an express contractual warranty of safe berth to EUSA;[1] however, the

[1] The HIRI defendants concede that EUSA contracted with PRII to sell crude oil products to PRII and to supply crude oil tankers to deliver the oil to a terminal designated by PRII.

multi-layered corporate structure surrounding both PRII and ESC complicates the inquiry into whether HIRI and PRI were also bound to provide "safe berth" to the EXXON HOUSTON. A brief review of the corporations involved is warranted. EUSA [Exxon Company, U.S.A.] does not own any vessels but rather trades in petroleum products. EUSA has a contract of affreightment with ESC pursuant to which ESC vessels carry petroleum products on behalf of EUSA. The EXXON HOUSTON was an ESC vessel. PRII, part of the Petroleum Business Group of PRI, operates as the buyer and seller of crude oil products for HIRI – PRI's subsidiary and refinery. PRII does not own any berths.[2]

Exxon argues that the safe berth clause in the telex contract between EUSA and PRII was clearly intended to benefit the EXXON HOUSTON because the contract explicitly stated it was meant to apply to vessels nominated by the delivering party – EUSA. Exxon also argues that the close relationship between PRII and HIRI, both subsidiaries of PRI, and the most reasonable interpretation of the telex contract require the court to find that the safe berth clause bound HIRI, which operated the SPM, as well as PRII, which did not own any berth.

The HIRI defendants protest that Exxon's reasoning disregards corporate formalities and argue, instead, that

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[2] According to the HIRI defendants, "[i]t was not uncommon for PRII to purchase oil products for probable sale and delivery to HIRI, which products would, in fact, after purchase by PRII, be sold by PRII to another refinery and delivered to the port and terminal of the alternate buying party." Memorandum in Opposition at 3-4.

PRII, PRI and HIRI are separate legal entities that do not necessarily bind one another in contract. Absent fraud or bad faith, the HIRI defendants continue, a corporation will not be held liable for the contracts of its subsidiaries, parents, or affiliates. On this basis, the HIRI defendants conclude that HIRI and PRI are not parties to the contract executed between PRII and EUSA and, therefore, are not bound by the express warranty of safe berth.

Presently, the court need not resolve the dispute, which will require resolution only in the event that PRII, if held to be liable under the warranty, is unable to pay the full amount of a money judgment assessed against it. Instead, the court now considers whether the warranty of safe berth remained in force and effect after the breakout regardless of which party was (or will be held) legally responsible for the breakout.

The HIRI defendants contend that Captain Dick failed to follow the ballasting parameters set forth in the HIRI Terminal Manual to minimize stress on the chafe chain. The HIRI defendants' sole source of evidence in this regard is taken from the Marine Board of Investigation Report, which is inadmissible as evidence. *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988) (holding that coast guard investigative reports are inadmissible as evidence in criminal and civil actions). In their opposition memorandum, the HIRI defendants, however, do not suggest that the alleged ballasting failure itself constituted an intervening cause that would supersede the warranty of safe berth. The HIRI defendants argue that Captain Dick's ballasting commands were simply negligent rather than extraordinarily negligent. As such, the HIRI defendants have not raised a genuine issue of material fact

that, *at the time of the breakout*, the warranty of safe berth had been superseded by Exxon's allegedly negligent acts with respect to ballasting.

At this juncture, however, the court need not determine, as a final matter, whether the warranty of safe berth was superseded by Exxon's acts prior to the breakout because the court holds as a matter of law, that a superseding force prior to the breakout does not "forgive" or otherwise excuse subsequent breaches of the warranty of safe berth. In other words, irrespective of which forces caused the breakout, the warranty of safe berth remained in force and effect, and could be breached, during the period of time following the breakout. In this regard, the court adopts the analysis set forth in Exxon's supplemental memorandum at pages 9 through 12.[3] For example, if the mooring master was incompetent because of insufficient skill, training, or experience, or if the assist vessels were undersized and underpowered, such acts and/or omissions might be covered by the warranty of safe berth notwithstanding Exxon's responsibility, if any, for the breakout.

Accordingly, for the reasons articulated above, Exxon's motion for partial summary judgment is GRANTED IN PART.[4]

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[3] In their supplemental memorandum, the HIRI defendants declined to address those breaches of the warranty of safe berth that are *subsequent* to a superseding cause. The court recognizes the possibility that the HIRI defendants concurred in Exxon's analysis of the issue.

[4] The court is well aware that several of the issues raised in Exxon's motion – whether HIRI is bound by the warranty of safe berth, whether the parting of the chafe chain constituted a breach of the warranty of safe berth, the scope of the warrantor or charterer's legal obligations pursuant to the warranty of safe berth – are not resolved herein. These issues, however, need not be resolved in order for the litigants to prepare for the first phase of the bifurcated trial now that the court has ruled that it will consider evidence relating to the warranty of safe berth or breach(es) thereof.

III. THE HIRI DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The HIRI defendants move for partial summary judgment on the grounds that any negligence of the mooring masters or the assist or standby vessels in this case should be imputed to the shipowner – Exxon – and not HIRI. When the EXXON HOUSTON arrived at the SPM, Captain Dick, the master of the vessel, signed on behalf of Exxon a document entitled "General Instructions, Discharging/Loading Orders and Indemnification." The General Instructions signed by Captain Dick contains the following indemnification agreement:

> INDEMNIFICATION. It is understood and agreed by you on behalf of the vessel and its owners that the Mooring Master, operators and crew of the tugs, assist and standby launches, and said launches and tugs, are supplied upon the condition that in the performance of any service they may render to your vessel, that they are the servants of the vessel and its owners in every respect and not the servants of Hawaiian Independent Refinery, Inc., Pacific Resources Terminals, Inc., Pacific Resources, Inc., or its subsidiaries, or the owners of said launches. It is further agreed that the vessel and its owners

> shall indemnify and hold harmless Hawaiian Independent Refinery, Inc., Pacific Resources Terminals, Inc., Pacific Resources, Inc., and its subsidiaries, and the owners of the assist and standby launches, from any liability, loss, claims or damages arising out of the rendering of services to your vessel by said Mooring Master, operators, crews and launches, whether or not arising out of the fault of said Mooring Master, operators, crew or said indemnitees. In addition, it is expressly agreed that the presence of the Mooring Master on board in no way relieves you, the Master of the vessel, of any legal responsibilities. FINAL DECISIONS REMAIN YOUR PREROGATIVE.

The express language of the Indemnification agreement makes it clear that the mooring masters and the assist or standby launches are servants of the vessel. According to the HIRI defendants, the agreement operates to shift all liability to Exxon for any negligence on the part of the HIRI mooring master or on the part of the launches provided to assist the EXXON HOUSTON.

For legal authority, the HIRI defendants rely entirely upon the Ninth Circuit's decision in *Kane v. Hawaiian Independent Refinery, Inc.*, 690 F.2d 722 (9th Cir. 1982). In *Kane*, a lineboat crewman was killed during the mooring of a tanker at HIRI's offshore petroleum products terminal at Barbers Point. The trial court held that the shipowner's liability was based, in part, upon the negligence of the mooring master assigned by HIRI to assist in the mooring of the vessel. The shipowner appealed contending that the mooring master's negligence should have been imputed to HIRI based on an implied warranty of workmanlike service.

On appeal, the Ninth Circuit recognized that the negligence of the mooring master is generally imputed to his employer, rather to the shipowner, where the employer hires, trains and assigns the mooring master, and requires the shipowner to use his services. The appellate court held, however, that this rule is inapplicable where the parties have agreed to shift their liability by signing a pilotage clause. 690 F.2d at 723 (citing *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 294-95, 53 S. Ct. 135, 77 L.Ed.2d 311 (1932)).

In *Kane*, the master of the vessel signed a "Pilotage Service Statement" prior to the mooring. The shipowner argued that the agreement was invalid because it was not freely bargained for in that (1) all vessels mooring at HIRI's berth were required to use the services of one of its mooring masters, (2) the shipowner did not request the services of a mooring master, (3) the pilotage clause and general instructions were given to the master of vessel only after the mooring master boarded the vessel, and (4) there were no prior dealings between the parties. There was also evidence at trial that the clause was not explained to the vessel's captain and that he spoke little English. The appellate court soundly rejected the shipowner's claim of compulsion by reasoning that "[a]ll parties were familiar with the custom of the industry regarding liability of pilots and mooring masters and cannot be heard to say that they were ignorant of the practice of attributing mooring masters' negligence to the shipowner." 690 F.2d at 724. The *Kane* court also explained the policy reasons underlying its decision in the following terms:

HIRI has a ligitimate interest in limiting its liability for damage caused by a large vessel moving under its own power. Imposition of such liability would have negligible deterrent value since HIRI already has ample incentive to avoid accidents in its own products terminal. . . .

Moreover, there are substantial policy interests in permitting the parties to allocate risks among themselves, both in terms of acquisition and retention of appropriate insurance coverage and of effective management of sea-going vessels. When access to insurance is considered, it is apparent that the pilotage clause assigned risk consistently with standard coverage, since the insurance commonly carried by sea-going vessels covers accidents under pilotage. There is every reason, therefore, to avoid drawing fine distinctions between the relative negligence of captain and mooring master when the two are in joint control of a ship's movement.

690 F.2d 724-25 (citations omitted). In light of *Kane*, the court concludes that any negligence committed by the Master Marvin or the assist or standby vessels, at least *after* the breakout, must be imputed to Exxon.

As a preliminary matter, Exxon refuses to concede that the pilotage clause should be recognized and enforced by the court. Exxon argues that the pilotage clause is unenforceable because it was not bargained for; however, *Kane* compels the court to reject Exxon's argument. Exxon attempts to distinguish *Kane* on the issue of compulsion by arguing that Exxon and HIRI had a prior agreement whereas the parties in *Kane* did not. As such, Exxon concludes that the pilotage clause was unsupported by consideration and, therefore, enforceable given

the extensive negotiations surrounding the telex contract, which guaranteed the EXXON HOUSTON's right to use the SPM. The argument cuts both ways. Any claim of surprise would be disingenuous in this case because Captain Dick, commanding the EXXON HOUSTON, allegedly docked at HIRI's SPM on several occasions prior to March 2, 1989. Furthermore, the court finds that there was adequate consideration that supported the pilotage clause. Although the EXXON HOUSTON may arguably have had a legal right to moor at the SPM pursuant to the telex contract, the EXXON HOUSTON, as a *practical* matter, would not have been allowed to moor at the SPM without Captain Dick having signed the pilotage clause.

As an alternative basis for denying summary judgment, Exxon argues that the warranty of safe berth, discussed earlier, precludes the assignment of the mooring master and the assist vessels' negligence to the EXXON HOUSTON. To the extent that the negligence of the mooring master or the assist vessels can be characterized as a breach of the warranty of safe berth, the court agrees that the HIRI defendants are not entitled to *summary judgment* on the issue of imputation. *California v. S/T Norfolk*, 435 F. Supp. 1039 (N.D. Cal. 1977); *United States v. GTS Adm. Wm. Callaghan*, 638 F. Supp. 687 (S.D.N.Y. 1986); *Ore Carriers of Liberia, Inc. v. Navigen Corp.*, 332 F. Supp. 71 (S.D.N.Y. 1969); *see also British Columbia Co. v. Mylroie*, 259 U.S. 1, 11-12 (1921) (concluding that tug boat pilot's negligence fell short of reasonable assistance guaranteed by charterer even though parties had signed general indemnification agreement). For example, as noted earlier, if the mooring master was incompetent because of insufficient skill, training, or experience, or if the assist vessels were

undersized and underpowered, such acts and/or omissions might be covered by the warranty of safe berth. On the other hand, where the conduct of the mooring master or assist vessels cannot be fairly linked to the warranty of safe berth – simple negligence, for example – the court holds that such negligence must be imputed to Exxon. Prior to trial, however, the court cannot determine where there is a potential overlap between the warranty and pilotage clauses.

Accordingly, the HIRI defendants' motion for partial summary judgment is GRANTED IN PART as and for the reasons stated above.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 9 1992

Harold M. Fong
UNITED STATES
DISTRICT JUDGE

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY, INC., et al. Plaintiffs, vs. PACIFIC RESOURCES, INC., et al. Defendants and PACIFIC RESOURCES, INC. et al. Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD. et al. Third-Party Defendants.	CIVIL NO. 90-00271 HMF PLAINTIFFS' MEMORANDUM CONCERNING PHASE OF BIFURCATED TRIAL IN WHICH EVIDENCE CONCERNING GALL THOMSON COUPLINGS SHOULD BE CONSIDERED; DECLARATION OF COUNSEL; EXHIBITS "A" THROUGH "H"; CERTIFICATE OF SERVICE (Filed Dec. 2, 1992) DATE: December 8, 1992 TIME: 9:00 a.m. JUDGE: Harold M. Fong

* * *

hoses did not part. The mooring masters were certainly aware, however, of the danger that the cargo hoses would fail. *Id.*

Despite clear evidence that operating within the specified environmental limitations was not adequate protection against mooring failures, and the obvious fact that once the mooring failed the cargo hoses might well be ripped apart, HIRI continued to operate the berth without adopting any precautions against subsequent mooring failures.

Six months before the EXXON HOUSTON called at the SPM in March, 1989, Andrew Marshall visited the SPM at the request of Thomas Cornwall, then a vice president of Hawaiian Independent Refinery, Inc., PRI International, Inc. and PRI Marine, Inc.

Since 1978, Andrew Marshall has been a Senior Engineer employed by the Arabian American Oil Company (ARAMCO) in Dhahran, Saudi Arabia. His resume is attached as Exhibit "D". He is, unquestionably, an expert in SPM operations and maintenance. It is equally clear that Thomas Cornwall regarded him as such when he asked that Mr. Marshall review HIRI's SPM operation and maintenance procedures.

Mr. Marshall visited the HIRI SPM, and also visited Michael Turina, HIRI's engineer, at the HIRI refinery at Barbers Point. He inspected the SPM, and reviewed the maintenance procedures employed by HIRI's offshore maintenance contractor, Uaukewai Fishing & Diving. On September 22, 1988, following his visit to the SPM and at

Mr. Cornwall's request, Mr. Marshall met with representatives of PRI Marine, Inc. and HIRI, including Mr. Turina.

At the meeting, Mr. Marshall discussed his observations and recommendations. He said that a breakaway was inevitable (he apparently was not told that two had already occurred). He also said that the SPM pipe arms were so poorly supported that eventually a mooring failure would result in the cargo hoses tearing off the SPM (Exhibit "E", p. 85; Exhibit "F" is the picture Mr. Marshall refers to in his testimony). He said Gall Thomson breakaway couplings were *essential* (Exhibit "E", p. 124).

In his deposition, Mr. Marshall said that he did not know whether, if HIRI had installed them, Gall Thomsons would have activated before the hose pulled free of the SPM, because of the defective SPM pipe arm (Exhibit "E", pp. 203-204).

Gall Thomson breakaway couplings are designed to be installed between sections of a hose string, fairly close to the ship's end of the hose string. They can be set to activate at a any of a wide range of tensions and, when activated, separate the hose string, closing each side of the hose string quickly enough to minimize the amount of oil spilled (Exhibit "G"). HIRI has recently purchased Gall Thomsons. Our experts have told us that the HIRI Gall Thomsons will probably be set to activate at between 28 tons and 35 tons.

If there is another component of a system under tension which is weaker than the Gall Thomsons, that other component will fail before the Gall Thomsons activate. Because the un-reinforced

* * *

[p. 85] Q That is shown in the photographs?

A It's shown in the photograph from the ship. The photograph through the bullnose shows the SPM, and on the left-hand side of the turntable of what I would call the overboard pipe arms, which come down and connect to the loading hoses, and I was particularly concerned about that design.

I wanted to know if there was any other load bearing structure around that pipe work as it passed through the deck. In other words, the overboard pipe arms are not supported in any other place in that top weld. And I considered that to be a poor design. Because when you have a breakout, which is inevitable, I told them you will tear off those pipe arms if the hoses are connected to the SPM.

Q So you didn't believe they were adequately supported?

A No. Or adequately fended.

The reason I made that statement was because ARAMCO had similar problems and we had redesigned our overboard pipe arms to withstand a hundred ton axial load.

Now, a hundred tons is way more than we'll ever – excuse me – a hundred tons is far

* * *

[p. 124] I considered to be the best double carcass hose manufacturer on the blackboard, and that is Dunlop.

Q Your former employer?

A By coincidence my former employer, who invented the double carcass hose. And back in 1988, '89, I don't believe there were any competitors on the market. There are now.

I also wrote down the name of Gall-Thomson.

Q For the breakaway couplings?

A For the breakaway coupling. I told them that we used Gall-Thomson breakaway couplings and I told them that in my opinion, it was an absolute essential. Essentially, is the position I put them in is the reducer position. So you substitute the reducer between the rail hose and the main line floating hoses with a breakaway coupling. Then, in the event of a breakout, not only have you saved your hoses, but you only have maybe four hoses connected to your manifold and there's no way of them interfering with the operation of the vessel.

I pointed out to them that in the event of the breakout, that they were going to have, because I told them they were going to have [p. 125] one, no question in my mind, that in my opinion, the overboard pipe arms, which I discussed earlier, would be ripped off the buoy because they're not supported at the bottom. And I also expressed my reservations about that design with respect to corrosion underside of the turntable at that weld connection point where the piping goes through the deck.

I also told them that it's very bad practice to burn the studs out of stud link chain.

Q Right. You mentioned that you addressed the subject of Chafe Chain at this meeting. Was that one of the subjects on that?

A Right. Never apply heat to a chain of any type.

My point about the chain was, you've got the big rope and then you've got the chain and then you're attaching the chain to the snotter, and then using that to moor the ship. Is that normal practice? And they said yes, fairly normal practice.

I suggested to them that they look into requesting vessels have equipment suitable to accommodate the chain rather than a snotter. Because in my opinion, you're downgrading the

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., AND SOFEC, INC., Defendants, and PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., AND PRI INTERNATIONAL, INC., Third-Party Plaintiffs,	CIVIL NO. 90-00271 HMF THIRD-PARTY DEFENDANT GRIFFIN WOODHOUSE, LTD.'S RULE 16 POSITION STATEMENT

vs.

BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.,

Third-Party Defendants.

THIRD-PARTY DEFENDANT GRIFFIN WOODHOUSE, LTD.'S RULE 16 POSITION STATEMENT

Third-Party Defendant GRIFFIN WOODHOUSE, LTD., by its counsel, respectfully submits that evidence concerning breakaway couplings which plaintiff now attempts to include in Phase One of the trial is precluded by the Court's Order Granting Motion to Bifurcate entered on July 31, 1992. GRIFFIN WOODHOUSE, LTD. further urges the Court to exclude such evidence on the grounds that it will reopen costly and new discovery amongst the parties and that the issue of breakaway couplings can be addressed, if necessary, in Phase Two of the trial. As currently structured, Phase One of the trial will focus on the navigation of the Exxon Houston by its officers under the circumstances presenting themselves at the time of the breakaway of the last hose at 1728. Thus, the benefit or lack thereof of a breakaway coupling would have occurred prior to or at 1728. The lack of a breakaway coupling is a Phase 2 issue and is clearly separate from the navigational issues.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (a Division of Exxon Corporation),

Plaintiffs,

vs.

PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.,

Defendants.

CIVIL NO. 90-00271HMF

PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC.,

Third-Party Plaintiffs,

vs.

BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.,

Third-Party Defendants.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on [p. ii] Tuesday, December 8, 1992 at 9:10 a.m., at Honolulu, Hawaii,

BEFORE:

HONORABLE HAROLD M. FONG
United States District Judge
District of Hawaii

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OFFICIAL COURT REPORTER – U. S. DISTRICT COURT

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[p. 3] and it broke loose at that point where just a short stump remained on the vessel then they would have been permitted to go forward.

Ms. Givens, tell me: Is there anything – have I stated it wrong somewhere or differently?

MS. GIVENS: Our point is a little bit different, Your Honor.

THE COURT: Oh, all right. Then why don't you tell me what it is.

MS. GIVENS: Our point is that Gall Thompson couplings, had they been present, could have been activated after the second cargo hose broke and had they been activated at that point, it would have eliminated the hazards to navigation, the grounding never would have occurred. We, therefore, think that it is similar to the issues of the competency of the mooring master and the adequacy of the tug in that all three factors, had they

been – those which would have been provided with a safe berth would have eliminated or at least reduced the hazards to navigation and it is, therefore, appropriate to consider it in the first phase of trial; that distinguishes from other aspects of a safe berth. For instance, the berth was unsafe because it had a defective chafe chain. However, even if there had been a safe chafe – safe chafe chain after 1728, it wouldn't have helped the EXXON HOUSTON at all. Once she had broken free, once she had a set [p. 4] of circumstances that she faced at 1728, a good chafe chain or a safe SPM wouldn't have helped her at all. Gall Thompsons could have helped after 1728 and we, therefore, think it's a Phase 1 issue.

THE COURT: How – how does a breakaway coupling – how would it have worked by your theory of the case?

MS. GIVENS: All right. The breakaway couplings are automatically activated when a certain tension is reached. There's no magic to the way in which the tension is reached. It can be reached when a ship breaks off a mooring and a certain tension pulls on the cargo hose. On the other hand, it can just as well be reached when a tug pulls on the loose end of the cargo hose. As long as that tension is reached, they will automatically activate. When they activate, they're set into the hose string very close to the ship end of the hose string. When they activate, they sever the two ends, the two sides of the hose string, and so what you are left with as relatively short line of hose still attached to the manifold of the ship which does not present any hazard to navigation, and we're saying that a tug could have done the job.

THE COURT: Well, but before a tug does the job, are you saying that it was also part of its function that even when moored and with the chain – safe or unsafe chafe chain – if it had been on, then it would have activated at that point – it could have activated at that point?

* * *

[p. 8] were both in very calm weather and they were able to keep the ships head near the SPM while they disconnected the hoses or brought another mooring assembly on board.

They knew they had a problem. They didn't solve it. Gall Thompsons were recommended to them because they were such an obvious and great solution to this particular berth's problems. So, yes, in this particular case as to this particular berth I would say that the failure to install Gall Thompsons did constitute a breach of the warranty of safe berth and that had they been installed the berth would have been considerably safer.

THE COURT: But, a safe berth, is that part of Phase 1 or Phase 2 of the trial?

MS. GIVENS: Well, Your Honor, as I understand it, we will be permitted to introduce evidence of breaches of the warranty of safe berth to the extent that they entail aspects of the berth which had they been safe would have reduced or eliminated the hazards faced by Captain Dick after 1728. We will be precluded from introducing any evidence of aspects of the berth which had they been safe might have prevented the chain failure or the cargo hose from ripping off. But, as to things which

could have made Captain Dick's circumstances either better or completely good, we will be allowed to introduce those in Phase 1.

THE COURT: All right. Let me hear from HIRI or

* * *

[p. 22] is making is: They're saying – and that is true what Mr. Marshal said. Mr. Marshal said there were quite a few problems with this SPM. One problem was they had had two previous location – locations where the chain or parts of the chain or fittings broke, but the sea was calm and no damage happened. The master was able to keep the ship close enough to the buoy so that the hose didn't even break. So, Mr. Marshal said that he was called by HIRI to review the berth and advised – he said: Look at the Waikiki over there. You don't want to spill there and you will have one because you had already two breakouts. You will have another. So, put in breakaway couplings in here and they cost only 200,000 per shot, and you have a little pin – a tiny pin in there which Mr. Playdon said can be calibrated to break at the exact load – Usually 25 tons for something like HIRI's operation – but, Mr. Marshal also said: Listen, your risers on the manifold are designed – seems to me just too weak. You know, in a case of a breakout, they might be weaker than the hose and six months later when the hose herein broke, he was proven right because one hose, as the fortune will tell you, broke above here – Mr. Turino, said that's where they should have had the breakaway coupling, but the other hose tore out parts of the manifold, so Captain Dick was stuck with

the entire length of the hose, plus bits and pieces of the manifold.

Now, the case that Exxon is making is they're [p. 23] saying: Let's assume there was a breakaway coupling right in here on the long hose. In other words, the second hose which tore off at the manifold, taking part of the manifold with it.

And Exxon says, and Mr. Marshal agrees, that that is possible because this was obviously very weak and it would be that it would have broken under a load lesser than that which it would have been necessary to activate the breakaway coupling. Then Exxon says: If HIRI had – and this is the major part of that assumption – if HIRI also had a 4000 horsepower tug out there, as opposed to their line boat, then that tug could have motored up to the hose and put a line on the hose and simply pulled the hose away from the vessel and activated the breakaway coupling and the EXXON HOUSTON would have been freed of the hose. The flaw, Your Honor, in that whole argument is not that it is not possible. It's indeed possible. The 4000 horsepower tug would have done it had they had one there. They had only a little line boat called NANA (Phonetic), which couldn't possibly have done it, but the 4000 horsepower tug could have – could have easily done it. Easily.

The flaw in the argument, as I understand, is if they had had the 4000 horsepower tug – and that's a tug necessary to pull the hose enough to activate the coupling – that tug wouldn't have had to do it and, as Mr. Marshal says in his affidavit that I'll be giving you momentarily, that

* * *

[p. 34] Phase 2 and somebody insists on going ahead and you try to block that, then it would be fair for that point of determining: Well, I might also agree with you it should be out of Phase 2, and maybe I should have considered it in Phase 1, then it would be unfair to the issue having been tried or addressed. But, if that can be addressed in Phase 2 of it, the Court is more persuaded that that may be where it belongs.

So, Ms. Givens, you have the last opportunity to convince me this is part of Phase 1. Why is it part of Phase 1?

MS. GIVENS: It is part of Phase 1 because we have been given the opportunity, in your order of October 9th, to put on evidence of breaches of the warranty of safe berth to the extent that they – that a safe berth would have eliminated or reduced the hazards faced by the captain after 1728. It would be extremely prejudicial to us if you were to determine cause as to the grounding after 1728 without considering whether or not HIRI breached its warranty of safe berth by failing to provide an adequate tug and Gall Thompson couplings. It's just fundamental fairness that we should be given the opportunity to present this in Phase 1. It is clearly something which would have affected events after 1728 in such a way that the grounding would not have occurred. It was probably one of the most effective things HIRI could have done to make that berth safe in the event of a breakout and [p. 35] the failure of the SPM manifold. The additional discovery entailed in putting on this evidence is nowhere near as extensive as the defendants have made out. Most of the

persons with information about the Gall Thompson couplings have already been deposed and they've already been asked about Gall Thompsons.

Andrew Marshal is one of two experts that Bridon would offer on the issue. He has been partially deposed and has talked at length about Gall Thompsons. We might have – we would have our expert offer a supplemental opinion and we would make him available for deposition immediately before trial and Andrew Marshal and the Gall Thompson representative could also be deposed immediately before trial. I do not believe that the spector of extensive and expensive additional discovery, No. 1, is valid – is accurate and, No. 2, is any reason to preclude us from offering all reasonable evidence of manners in which the berth could have been made safe in the event of a breakout at the berth.

THE COURT: All right. Any final word before the Court rules?

(No response)

THE COURT: Well, the Court is now introduced to the breakaway coupling. From the standpoint of view that this is part of a safe berth, from the standpoint of view that it may have affected the presence of the hose across the bow to [p. 36] possibly give an extra option of movement to the captain, when this Court bifurcated this case it defined Phase 1 as that portion of the trial where the captain finds himself in the situation with the hose across the front of the bow and dragging the line, with his maneuver backing up because he said that was the only thing to do – or the only thing he could do, and if this Court were to add the breakaway coupling, it would

change the parameters of that trial, but the Court is concerned about the speculative nature, which on one hand HIRI says that this is really a design decision that they made. They designed it such that they were not going to utilize that in their system; that clearly design would clearly be a Phase 2 portion so that the Court can see that this is a logical phase in Phase 2 where the issue of not having designed a breakaway coupling would be a natural consequence or a natural part of the decision of a safe berth.

I'm also concerned about speculation that when Mr. Krek now tells me that it could possibly have broken off at the manifold – at the SPM at a different tonnage pull than what it would have been to break it away naturally or automatically at the breakaway coupling point.

I'm also concerned about the second phase or second point about the availability of an adequately tonnaged tug, who – or which might have done the work that Ms. Givens talked about, that it must have broken off the line, but, as

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation),	) CIVIL NO. 90-00271 HMF) IN ADMIRALTY
Plaintiffs,	) PRETRIAL) CONFERENCE ORDER
vs.	)
PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.	) (Filed Dec. 14, 1992)) Date: December 8, 1992) Time: 9:00 a.m.) Judge: Judge Harold M. Fong
Defendants,	
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC.,	
Third-Party Plaintiffs,	

vs.

BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.,

Third-Party Defendants.

PRETRIAL CONFERENCE ORDER

A pretrial conference was held on Tuesday, December 8, 1992 before the Hon. Harold M. Fong, United States District Judge. Appearing at the conference were Leonard F. Alcantara, Esq. and Judy S. Givens, Esq., for Plaintiffs, George W. Playdon, Esq. and Patricia K. Wall, Esq. for Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc. (collectively "HIRI"), Nenad Krek, Esq. for Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd., and John R. Lacy, Esq. for Defendant and Third-Party Defendant Griffin Woodhouse, Ltd.

Pursuant to Federal Rules of Civil Procedure, Rule 16(e), the Court enters this pretrial conference order:

1. Evidence concerning Gall Thomson marine breakaway couplings shall not be admitted in Phase One of the trial. Such evidence may be introduced in Phase Two of the trial.

2. This order shall remain in effect until modified by the Court.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, DEC 14 1992.

HAROLD M. FONG
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A division of Exxon corporation), Plaintiff, vs. PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC.; and SOFEC, INC., Defendants.	CIV. NO. 90-00271 HMF
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD.; GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC., Third-Party Defendants.	[FINDINGS OF FACT AND CONCLUSIONS OF LAW] (Filed May 20, 1993)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 2, 1989, the oil tanker EXXON HOUSTON stranded near Barbers Point on the island of Oahu after breaking away from its mooring earlier that day. Between February 9, 1993 and March 3, 1993, the court held a bench trial in this admiralty action relating to the stranding. The trial was the first phase ("Phase One") of a bifurcated proceeding, and was limited to events occurring after the EXXON HOUSTON broke away from its mooring.

The court makes the following findings of fact and conclusions of law. To the extent that any findings of fact herein are more properly construed as conclusions of law, they shall be so construed; and to the extent any conclusions of law are more properly construed as findings of fact, they shall be so construed.

FINDINGS OF FACT

A. Parties

1. Plaintiff Exxon Shipping Company was the owner and operator of the EXXON HOUSTON, an oil tanker. Exxon Shipping Company vessels carry petroleum products for Plaintiff Exxon Company, U.S.A. This order will refer to the Plaintiffs collectively as Exxon.

2. Defendants and Third-party Plaintiffs Pacific Resources, Inc., PRI International, Inc., and Hawaiian Independent Refinery, Inc. are affiliated corporations. These corporations trade in oil and operate the single point mooring and refinery at Barbers Point.

3. Defendant Sofec, Inc. manufactured the single point mooring at Barbers Point.

4. Third-party Defendant Griffin Woodhouse, Ltd. manufactured the chafe chain which held ships to the single point mooring.

5. Third-party Defendant Bridon Fibres and Plastics, Ltd. distributed the chafe chain.

6. Third-party Defendant Werth Engineering, Inc. was dismissed from this action before the trial. This order will refer to the Defendants and Third-party Defendants collectively as the Defendants.

B. Contractual Arrangements

7. Plaintiff Exxon Company, U.S.A., a division of Exxon Corporation, and Defendant PRI International, Inc., ("PRII") entered into a buy/sell arrangement in 1988, pursuant to which Exxon Company, U.S.A. delivered Alaska North Slope crude oil to PRII and PRII delivered West Texas Intermediate crude oil to Exxon Company U.S.A.

8. Among the terms of the agreement was a paragraph entitled "Safe Berth Availability" which provided, in relevant part:

> The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat. However, notwithstanding anything contained in this clause, the terminal shall not be deemed to warrant the safety of public channels, fairways, approaches thereto, anchorages, or other publicly-maintained areas either inside or outside the port area where the vessel may be directed.

9. On April 4, 1988, at PRII's request, Exxon U.S.A. agreed that the above quoted provision "includes 'single point mooring' ". The provision, as amended, was in effect on March 2, 1989.

10. On June 7, 1988, Exxon U.S.A. agreed to deliver crude oil "by vessel into Hawaiian Independent Refinery, Ewa Beach, Hawaii via offshore single point system, or upon request by PRI vessel into a West Coast refinery or terminal acceptable to Exxon."

11. On March 1, 1989, pursuant to the above contract, the EXXON HOUSTON arrived at the single point mooring (SPM) at Barbers Point, Oahu. The SPM is owned and operated by Defendant Hawaiian Independent Refinery, Inc. (HIRI), an affiliate of PRII.

C. Arrival Of The EXXON HOUSTON At HIRI's SPM

12. At all times relevant to Phase One trial, the EXXON HOUSTON was a single screw, steam propulsion oil tanker, 72,056 dead weight tons and 766.9 feet in length, with shaft horsepower of 19,000 ahead, and approximately 6,000 astern.

13. At all times relevant to Phase One trial, the EXXON HOUSTON was equipped with two forward anchors, mounted on the port and starboard bows respectively, and another anchor astern. The forward anchors carried with them 1,080 feet of anchor chain.

14. At all times relevant to Phase One trial, Kevin Dick was the Master of the EXXON HOUSTON. Kevin Dick has changed his name to Kevin Coyne, and these findings of fact will refer to him as Captain Coyne. Captain Coyne was an employee of Exxon Shipping Company and was acting within the course and scope of his duties throughout the events leading up to the stranding.

15. Previous visits in Exxon tankers had familiarized Captain Coyne with HIRI's single point mooring at Barbers Point. At these earlier visits, HIRI mooring masters had briefed Captain Coyne on the conditions at the SPM. This briefing included information about the unpredictability of currents at the SPM.

16. On March 1, 1989, the EXXON HOUSTON arrived at HIRI's SPM. Captain Stephen Kuntz, a mooring master provided by HIRI, boarded the EXXON HOUSTON and oversaw the mooring of the vessel to the SPM.

17. Before allowing the vessel to moor at the SPM, Captain Kuntz presented to Captain Coyne a document entitled General Instructions, Discharging/Loading Orders and Indemnification, dated March 1, 1989, which Captain Coyne signed.

18. On March 2, 1989, the EXXON HOUSTON was manned by the following officers (other than Captain Coyne) who were employed by Exxon Shipping Company:

Name	Position
Duane Madinger	Chief Mate
Hallock Davis	Second Mate
Raymond Spiller	Third Mate
Richard Spear	Third Mate

All were acting within the course and scope of their duties that day.

19. Third Mate Spear had been relieved by Third Mate Spiller on March 1, 1989, but remained on board through March 2, 1989 as an extra man per Captain Coyne's instructions.

20. On March 2, 1989, Marie Huhnke, a licensed third mate, was employed by Exxon Shipping Company on board the EXXON HOUSTON as an able-bodied seaman (AB).

21. On March 2, 1989, Captain Steven Marvin relieved Captain Kuntz as mooring master and was on board the EXXON HOUSTON at all times relevant to Phase One trial.

22. Captain Marvin was a competent and experienced mooring master by virtue of his naval background, his training as a mooring master, and his 8 years of experience as a HIRI mooring master. Captain Marvin did not have a master's license nor experience aboard commercial tankers as master or first mate. These were HIRI requirements for mooring masters which were instituted after Captain Marvin had begun serving as a mooring master. The court finds Captain Marvin's failure to meet

these requirements to be irrelevant in light of his experience and training and not a cause of the incident on March 2, 1989.

23. On March 2, 1989, the EXXON HOUSTON was moored to HIRI's SPM and discharging oil into HIRI's submerged pipeline. The discharge required two floating hoses, each approximately 840 feet in length, which ran from the port manifold of the EXXON HOUSTON to the SPM. Each hose was secured to the ship's manifold by twelve bolts and several restraining lines.

24. A mooring assembly including a chafe chain and mooring hawser attached the bow of the EXXON HOUSTON to the SPM. During normal operations at the SPM, the mooring assembly held the ship in place and allowed the hoses to float freely without any tension.

D. The Breakout

25. On March 2, 1989, while the EXXON HOUSTON was discharging oil at the SPM, there was a heavy storm with winds and seas coming generally from the south (a Kona storm). At 1715,[1] the storm caused a link in the chafe chain to part. The ship began to drift away from the SPM, putting the hoses under tension.

26. Despite an attempt to keep the ship near the SPM, the hoses parted. The first hose parted close to the water line of the vessel beneath the port manifold of the

[1] In conformance with the trial testimony, all times in these findings are given in Honolulu local time in military format. Thus, 5:15 p.m. Honolulu time is written as 1715.

EXXON HOUSTON at 1725. Because only a short portion of this hose was left attached to the ship, it was not a threat to the ship's subsequent handling.

27. The second hose parted at approximately 1728 on March 2, 1989. This is the point which has been designated as the "breakout" and is the initiating point in time for the Phase One trial.

28. The second hose tore a heavy metal spool piece off the SPM, leaving approximately 840 feet of that hose connected to the ship's port manifold. Approximately 100 feet at the end of the hose sank due to the weight of the spool piece. The remainder of the hose continued to float. (Any further references to "the hose" refer to this second, longer hose.)

29. The hose was long enough to reach the ship's propeller from the port manifold. Captain Coyne was justifiably concerned that the hose would foul the propeller if the ship went forward.

30. A small line handling boat, the NENE, was at the SPM to assist the EXXON HOUSTON when the breakout occurred. The NENE was too small to push or tow the EXXON HOUSTON to safety after the breakout.

31. At 1728, the EXXON HOUSTON's draft was 15 feet forward and 30 feet aft. This left an unusually large portion of the EXXON HOUSTON's bow above the water, making the vessel more difficult to turn in the wind.

32. During the period between 1728 and 2009, the bridge of the EXXON HOUSTON was manned by an able-bodied seaman acting as the helmsman, and the

following vessel's officers and the mooring master as shown below:

A. From 1728 until 1830:
Captain Coyne
Captain Marvin
Second Mate Davis

B. From 1830 until 1948:
Captain Coyne
Second Mate Davis

C. From 1948 until 2000:
Captain Coyne

D. From 2000 until 2009:
Captain Coyne
Third Mate Spiller

33. Two vessels had broken away from HIRI's SPM on previous occasions. In one case the vessel was successfully remoored to the SPM, while in the other case the vessel's master kept the vessel's head to the SPM while the oil hoses were disconnected.

34. At 1730, the U.S. Coast Guard Joint Rescue Coordination Center initiated a radio call to the EXXON HOUSTON asking if assistance was needed. The Coast Guard told Captain Coyne that assistance vessels would take more than two hours to arrive. Captain Coyne refused the offer of assistance, believing that the situation would be resolved within that time.

E. Attempt To Anchor

35. At approximately 1740, Captain Coyne dropped his forward starboard anchor which paid out one shot (15 fathoms/90 feet) of chain. The depth of water in the area where the anchor was dropped is 10-11 fathoms (60-66 feet).

36. The standard practice in anchoring a ship is to release several additional shots of chain which increase the anchor's holding power. When the anchor stops pulling chain out by itself, the ship deploys the extra chain by either going slightly astern or by pushing chain out with the anchor windlass.

37. One shot of chain could not hold the ship in 10-11 fathoms of water. Five to six shots of chain would have been required to hold the EXXON HOUSTON at its 1740 anchoring position. On the evening of March 2, 1989, the EXXON HOUSTON had on board and available 12 shots (1080 feet) of anchor chain for each of the forward anchors.

38. Captain Coyne neither went astern nor engaged the windlass to deploy the chain. Captain Coyne abandoned the anchoring attempt at 1747 after the chain did not pay out of its own accord.

39. While raising the starboard anchor, the long hose became lodged on the anchor. Captain Coyne then ordered the anchor re-lowered to dislodge the hose from the starboard anchor.

40. Although in retrospect this might have provided an opportunity to keep the hose secured away from the propeller, there was a real possibility that the hose would later free itself and again endanger propulsion. Moreover, the situation presented to Captain Coyne was a novel one, and it was not negligent that Captain Coyne did not

think of exploiting the happenstance snagging of the hose.

41. After Captain Coyne raised the starboard anchor at approximately 1747, he never again attempted to anchor the EXXON HOUSTON prior to the stranding.

42. A review of the track taken by the EXXON HOUSTON between 1747 and 2009 shows numerous areas where the vessel could have safely anchored.

F. The Transit

43. By 1803, the NENE had attached a line to the hose and was able to control the end of the hose, keeping it on the EXXON HOUSTON's port side and away from the EXXON HOUSTON's propeller. Captain Coyne ordered the NENE's movements as necessary to coordinate with the EXXON HOUSTON's movements.

44. The EXXON HOUSTON backed out to sea between 1803 and 1830. Its position was plotted on chart # 19362 for times 1740, 1747, 1803, 1820 and 1830. From 1803 to 1830, the EXXON HOUSTON made a course of 260°, proceeding in a generally westerly direction at a speed of 2 knots over ground, on a half astern bell. This course took the EXXON HOUSTON out to sea and away from shallow water.

45. Captain Marvin testified that at 1830, positions for times 1803, 1820, and 1830 were not plotted on the chart. The implication of this testimony is that the three fixes were falsified. Captain Marvin further testified that he had accurately estimated the ship's position at 1830 to

be 800 yards due west of the SPM, a position that conflicts with the plotted 1830 position. The court finds these portions of Captain Marvin's testimony to be not credible in light of the weight of the evidence. The court finds that the 1803, 1820, and 1830 fixes accurately reflect the positions of the EXXON HOUSTON at those times.

G. Post-1830 Maneuvers

46. At 1831, Captain Coyne quit transmitting away from the shore and ordered a slow ahead bell. The change of course at 1831 was not caused by any necessity or emergency and there was no reason why the vessel could not have continued to back out to sea after 1830. At 1830, the EXXON HOUSTON was only slightly more than one mile away from the shore, and about a half mile from the grounding line.

47. The EXXON HOUSTON remained from 0.9 to 1.1 miles from shore from 1830 until 1956. Had Captain Coyne so decided he could have continued to back the ship after 1830 to any distance offshore he wanted. Later in the evening, Captain Coyne could have suspended disconnecting the hose at any time and backed another mile to deeper water. Backing further to sea could have been accomplished without significant risk to the EXXON HOUSTON or the NENE, and in fact posed much less risk than remaining near the shore while a Kona storm tended to push the ship ashore.

48. At 1831, Captain Coyne began backing and filling-alternating short ahead and astern bells to maintain a sheltered lee on the port side of the vessel. The lee

allowed the hose to be disconnected with reduced exposure to the wind and seas from the south. The backing and filling caused the ship to stop its progress away from the shore.

H. Navigation After 1830

49. Between 1830 and 2004 on the evening of March 2, 1989, a period of one hour and thirty four minutes, no positions of the EXXON HOUSTON were plotted on any chart.

50. At some time between 1830 and 2004, the EXXON HOUSTON moved out of the area charted on chart # 19362. At that point, chart # 19357 should have been used. Chart # 19357 was less detailed than chart # 19362, but was adequate for plotting fixes. Fixes could have been plotted on Chart # 19357 without obliterating either prior fixes or the information on the chart.

51. There are adequate charted aids to navigation in the vicinity of Barbers Point.

52. A prudent mariner would have fixed and plotted his vessel's position at least every 15 to 20 minutes in the situation in which the EXXON HOUSTON found itself after 1830 on March 2, 1989. Many factors existed that day that would have compelled a prudent mariner to fix his position frequently. These factors include, but are not necessarily limited to: the proximity to shore, the rough weather pushing the ship shoreward, the difficulty of estimating the ship's position in the dark, the possibility that removing the hose would be a distraction from

navigation, and the difficulty of maneuvering the EXXON HOUSTON with the hose attached.

53. Frequent plotting of the vessel's position would have enabled Captain Coyne to determine the effects of wind, sea and any currents on the tanker, and would have alerted him that he was approaching danger.

54. Captain Coyne had personnel available for the plotting of fixes but failed to use them. As a requirement of receiving a third mate's license, an individual must pass a Coast Guard examination and demonstrate an ability to take and plot fixes. Each of the officers and AB Huhnke were able to take and plot fixes.

55. Captain Coyne testified that between 1830 and 1956, he navigated by the method of parallel indexing, a technique in which a line is drawn on the radar to show relative movement with respect to an object. Using parallel indexing, Captain Coyne endeavored to keep the EXXON HOUSTON at a distance of 0.9 to 1.1 miles from the shore.

56. Parallel indexing is not a substitute for fixing the position of the vessel. Navigation by parallel indexing without plotted fixes is inherently dangerous and a violation of industry standards.

57. With respect to the technique of parallel indexing, the Exxon Navigation and Bridge Organization Manual specifically states as follows:

> Parallel indexing does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes.

* * *

FAILURE TO FOLLOW THE ABOVE PRECAUTIONS OR TO PROCEED WITHOUT RELIABLE CHARTED FIXES IS DANGEROUS. PARALLEL INDEXING IS A SUPPLEMENTAL NAVIGATIONAL TECHNIQUE ONLY.

Joint Trial Exhibit 250, Appendix G, p. 5 (capitalization in original).

58. Captain Coyne testified at trial that he often ascertained the position of the ship after 1830 even though he failed to plot it on the chart. For the reasons explained below, the court finds this testimony to be not credible.

59. Captain Coyne's trial testimony contradicts his own earlier deposition testimony. Captain Coyne testified at trial that he took bearings to Barbers Point lighthouse after 1830. These bearings and the parallel indexing range taken from the radar supposedly allowed him to ascertain the ship's position. At his deposition on April 3, 1991, however, Captain Coyne testified that he did not remember taking bearings and that he relied on parallel indexing. When asked to explain this discrepancy at the trial, Captain Coyne did not have a plausible explanation.

60. Captain Coyne also testified at trial that he and Second Officer Davis frequently cross-checked their parallel indexing and that both understood the ship's navigational situation. This situation, as described by Captain Coyne and confirmed by the ship's ultimate stranding position, was that the EXXON HOUSTON rounded Barbers Point and moved northward along Oahu's west shore. In order to monitor this progress, Captain Coyne

would have needed to use chart # 19357. In contrast, Second Officer Davis testified in his deposition that he believed the ship had remained near its 1830 position in the area charted on chart # 19362. He further testified that chart # 19357 was not used while he was on the bridge. Second Officer Davis' account shows that he did not know the true position of the ship, and casts further doubt on Captain Coyne's assertion that Second Officer Davis and Captain Coyne cross-checked their positions.

61. The conflicting testimony is not the only evidence that Captain Coyne did not know the position of the EXXON HOUSTON after 1830. As discussed in more detail below, at 1956 Captain Coyne ordered a right turn that took the EXXON HOUSTON directly onto a charted reef. The most plausible explanation for that turn is that Captain Coyne did not know the EXXON HOUSTON's position when he started that turn.

62. Thus, the court finds that Captain Coyne did not take bearings to ascertain the EXXON HOUSTON's position after 1830 on March 2, 1989. From 1830 to 2004, Captain Coyne knew only his range from shore from the parallel indexing plot. This single input did not allow him to fix the ship's positio . Without a fix, Captain Coyne was not able to check the chart for hazards.

I. Hose Disconnect And Crane Failure

63. At 1830, Captain Marvin left the bridge of the EXXON HOUSTON to assist with disconnecting the hose. Captain Marvin did not return to the bridge again until after the grounding. Captain Coyne did not ask Captain Marvin to return to the bridge at any time after 1830.

64. It took over an hour to disconnect the hose. After the hose was disconnected, the EXXON HOUSTON's port crane was used to lower the hose into the water. While the hose was suspended from the crane, the NENE and the EXXON HOUSTON moved apart, causing the crane to collapse at 1944.

65. The crane's collapse freed the hose, allowing it to drop into the water. At 1947, the NENE pulled the hose clear of the EXXON HOUSTON.

66. As the crane collapsed, it carried the crane operator's seat onto the deck with it. Chief Mate Madinger feared that the crane operator, AB Ike Denton, had been injured. Denton was taken to his quarters.

67. At 1948, Captain Coyne sent Second Mate Davis from the bridge to evaluate AB Denton's condition. Second Mate Davis had received medical training from Exxon Shipping Company, and was the designated "first responder" for medical casualties.

68. Captain Coyne did not replace Second Mate Davis with another officer on the bridge. From approximately 1948 to 2000, Captain Coyne was the only officer on the bridge of the EXXON HOUSTON. That left the bridge inadequately manned, with no other officer to fix the vessel's position.

69. Between 1948 and the time of the stranding, there were additional ship's officers available for duty on the bridge.

70. Exxon Shipping Company's Navigation and Bridge Organization Manual ("Navigation Manual") required that under conditions similar to those present on

the March 2, 1989, at least two ship's officers be present on the bridge at all time.

71. If the bridge had been properly manned, the danger of stranding would have been avoided.

J. The Final Turn

72. After evaluating AB Denton, Second Mate Davis reported to Captain Coyne that AB Denton was possibly going into shock, but had no external injuries.

73. Because Captain Coyne had more medical training than Second Mate Davis, Captain Coyne decided that he should personally evaluate AB Denton's condition as soon as possible. In order to accomplish this, Captain Coyne decided to rapidly move the ship away from the coast so that he could allow another officer to relieve him on the bridge.

74. At 1956, Captain Coyne commenced the "final turn," a right turn on a half ahead bell, which he then reduced at 1958 to a slow ahead, and he proceeded to execute the attempted turn on slow ahead bell until 2005.

75. Captain Coyne did not look at the navigational chart before commencing the final turn.

76. At the time when he commenced the final starboard turn, Captain Coyne did not know the ship's position.

77. The prevailing directions of the wind and sea, the EXXON HOUSTON's trim condition, and the low engine speed tended to broaden the turn, carrying the

ship towards the shore. Given these factors, a prudent mariner would not have attempted the starboard turn.

78. The starboard turn was towards the coast line, towards shallower water and towards potential danger. The starboard turn was grossly negligent, regardless of whether or not it could have been made successfully.

79. Backing out to sea or turning to port were viable and safe alternatives to the starboard turn. These options would have taken the EXXON HOUSTON away from the coast rapidly, allowing Captain Coyne to leave the bridge and attend to AB Denton.

80. Captain Coyne's stated reasons for rejecting the alternatives to the final turn do not excuse his choice. Captain Coyne testified that he rejected the port turn because of fears of colliding with the NENE and that he rejected backing out to sea because it was too slow and ineffective. Any danger of colliding with the NENE during a port turn could have been easily avoided by radar and/or radio contact. Backing out to sea was also a proven and effective maneuvering option.

81. Third Mate Spiller arrived on the bridge at around 2000. Captain Coyne was in doubt as to the ship's position at that time, and ordered Third Mate Spiller to take a fix of the vessel's position. Third Mate Spiller plotted the fix on chart # 19357 for time 2004.

82. When Captain Coyne saw the 2004 fix on the navigational chart, he exclaimed, "Oh, shit!" He immediately ordered an increased speed of half ahead, followed by full ahead at 2005.5.

83. The EXXON HOUSTON stranded at 2009 approximately 0.5 miles off of Barbers Point at 21° 17.8' N, 158° 07.3' W.

84. The stranding occurred at a reef that was clearly charted on Chart # 19357.

85. Over two and one-half hours elapsed between the breakout and the stranding. During that period, Captain Coyne and his crew had ample time to consider the situation calmly and deliberately.

K. Current Information

86. Exxon has argued that the final turn failed only because of a large current that pushed the ship onto the reef. Exxon claims that the current was predictable, that HIRI should have warned Captain Coyne about the current, and that Captain Coyne would not have attempted the final turn had he known about the current.

87. In his videotaped deposition, Dr. Karl Bathen testified as to the magnitude, direction, and predictability of the currents affecting the ship at Barbers Point on March 2, 1989. That testimony showed that the currents at the area where the ship stranded changed rapidly during the evening.

88. Exxon failed to show that the current studies done by Dr. Bathen could have been reduced to a format that would be easy for a ship's master to use. Dr. Bathen included a large number of variables in his study, including wind magnitude and direction, tide magnitude and direction, sea magnitude and direction, and bottom depths. The court finds that any current data such as that

presented by Dr. Bathen would have been either extremely difficult to use, or would have yielded only very general results.

89. Captain Coyne would not have used current data such as that prepared by Dr. Bathen had it been available to him on the bridge on March 2, 1989. Captain Coyne's decision to turn to starboard was made in haste without due consideration of several other pieces of information which should have caused him to reject the turn. For example, Captain Coyne decided to turn without looking at the chart, without fixing or plotting the vessel's position since 1830, without checking the NENE's position by radar or radio, and without consulting any of his officers or Captain Marvin. In short, Captain Coyne recklessly ignored all pertinent information that was available to him. The court is therefore convinced that Captain Coyne would not have used any current studies had they been available. Therefore, the absence of such studies was not a cause in fact of the stranding.

L. Post-Stranding Changes in SPM Operating Procedures

90. After the events of March 2, 1989, the Coast Guard has required that HIRI provide 30-minute standby tug assistance to tankers at the SPM. The required tugs must be able to handle a disabled tanker in forty knot winds. Had such tug assistance been available on March 2, 1989, Captain Coyne would have used it and the EXXON HOUSTON would not have stranded.

91. In the wake of the EXXON HOUSTON stranding, the Coast Guard has also designated the SPM as a

pilotage area. HIRI is now required to provide two mooring masters with pilot's licenses for ships at the SPM.

CONCLUSIONS OF LAW

1. This is an admiralty and maritime claim within the meaning of Fed. R. Civ. P. 9(h) and within the admiralty jurisdiction of this Court under 28 U.S.C. § 1333.

2. Pursuant to the Order Granting Motion To Bifurcate, entered on July 31, 1992, and the Order Denying Plaintiffs' Motion For Clarification, entered on August 27, 1992, Phase One of the trial was limited to a determination of issues after the breakout of the EXXON HOUSTON at 1728. Phase Two will explore the causes of the breakout.

3. The court bifurcated the trial because a substantial question existed as to whether the post-breakout navigation of the EXXON HOUSTON constituted a superseding, intervening cause of the stranding.

4. In light of the bifurcation order, the alleged causes of the stranding may be divided into three groups: the causes contributing to the breakout; HIRI's post-breakout violations of the safe berth clause; and Exxon's post-breakout navigation. In order to find that any one of these asserted causes justified the imposition of liability, the court would need to find the breach of a duty, that the breach was a cause in fact, and that the breach was a proximate cause of the stranding.

A. The Breakout

5. Exxon has alleged that the Defendants are responsible for the breakout and that the breakout was a proximate cause of the stranding.

6. By bifurcating the trial, the court relieved Exxon of the burden of proving in Phase One that Defendants were at fault or strictly liable for the breakout.

7. Obviously, the breakout was a cause in fact of the stranding, i.e., had the mooring chain not parted, the EXXON HOUSTON would not have stranded.

8. As stated in the court's July 31, 1992 bifurcation order, in order to prove that the breakout was a proximate cause, "Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of the grounding." *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982). The question of proximate causation is considered below.

B. Post-Breakout Breaches of the Safe Berth Clause

9. Exxon claims that HIRI's SPM was an unsafe berth in breach of the safe berth clause in the Voyage Charterparty between Exxon Shipping Company and PRII. Exxon presented three theories of how the duty was breached: that the mooring masters were inadequate; that tug assistance was inadequate; and that current information was inadequate.

10. The court turns first to the scope of the duty. Although this court has previously referred to the safe berth clause as a "safe berth warranty," the court has not

considered the scope of the charterer's duties under a safe berth clause. Exxon argues for the Second Circuit rule that a charterparty's safe berth clause makes a charterer the warrantor of the safety of a berth. See, e.g., *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804 (2d Cir.), *cert. denied*, 342 U.S. 862 (1951). HIRI counters that the better rule avoids the imposition of strict liability upon the charterer. Under this rule, a safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth. *Atkins v. Fibre Disintegrating Co.*, 2 Fed. Cas. 78 (E.D.N.Y. 1868) (No. 601), *aff'd* 85 U.S. (18 Wall.) 272 (1873); *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir. 1990). The weight of academic opinion supports the due diligence standard. *See* Gilmore & Black, *The Law of Admiralty*, § 4-4 at pp.205-207 (2d Ed. 1975); J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 862-869 (1975). In the absence of Ninth Circuit authority on the question, the court will follow the persuasive reasoning of the Fifth Circuit's *Orduna* opinion. Thus, the court holds that a safe berth clause imposes on the charterer a duty of due diligence to select a safe berth.

11. Having decided the scope of the safe berth duty, the court turns to whether that duty was breached after the breakout. In the following paragraphs, the court concludes that it was not.

12. The first asserted safe berth breach is the inadequacy of mooring master assistance. Exxon contends that HIRI should have provided two mooring masters, and that they should have been certified pilots. As evidence of this duty, Exxon relies upon the fact that the Coast Guard instituted these requirements after the EXXON

HOUSTON stranded. Over HIRI's objection that these were remedial measures, the court allowed this evidence at trial because the Coast Guard mandated the measures. *See In re Aircrash in Bali, Indonesia*, 871 F.2d 812 (9th Cir.), *cert. denied*, 493 U.S. 917 (1989).

13. A duly diligent charterer would not have foreseen a need to provide two mooring masters on March 2, 1989. Exxon adduced no evidence that would show that HIRI should have anticipated that additional mooring master assistance was needed. Indeed, even with the hindsight of knowing how the EXXON HOUSTON stranded, the court sees no need for two mooring masters as neither mooring master fatigue nor unavailability played a role in the casualty. Although the bridge was inadequately manned on the evening of March 2, 1989, there were available ship's officers who could have manned the bridge. Captain Coyne's failure to use his own crew does not create a duty on HIRI's part to supply another mooring master.

14. Similarly, the pilot's license requirement has not been shown to be a necessary element of a safe berth. Although a pilot would have been arguably more familiar with local conditions, lack of experience with local conditions did not contribute to the stranding. Captain Marvin had adequate experience to prevent the casualty had Captain Coyne consulted him after 1830. Thus, HIRI satisfied its safe berth duty by providing one competent mooring master, Captain Marvin.

15. Exxon's second theory is that the berth was unsafe because a tug capable of towing a disabled tanker was not available. As evidence of the need for such tug

assistance, Exxon points out that the Coast Guard has instituted this requirement since the EXXON HOUSTON incident.

16. Exxon has not met their burden of showing that a duly diligent charterer would provide tug assistance. Notably absent from Exxon's case was expert opinion as to the industry standard. In assessing due diligence, the court is left only with the Coast Guard requirement and the nature of the EXXON HOUSTON incident itself. The court considers the Coast Guard requirements to be only minimally relevant to the inquiry of whether the need for tug assistance was foreseeable before March 2, 1989. Countering Exxon's claim that tugs should have been required, the EXXON HOUSTON episode itself shows that a tanker could maneuver itself to a safe position without forward propulsion in a heavy storm. The weight of the evidence does not support Exxon's claim that a duly diligent charterer would have provided additional tug assistance on March 2, 1989.

17. The final safe berth theory is that HIRI should have provided detailed current studies of the grounding area. The evidence that a duly diligent charterer would have done such studies is minimal. Unlike the other theories of safe berth breaches, the Coast Guard has not required current studies in the wake of the EXXON HOUSTON stranding. Moreover, Exxon presented no evidence of the industry standard. HIRI did provide an experienced mooring master who briefed the ship's master on environmental conditions. The court concludes that the safe berth clause did not impose any greater duty on HIRI.

18. In summary, the court concludes that after the breakout, HIRI did not breach any duty imposed by the safe berth clause.

C. Exxon's Negligence

19. The court now turns to whether Exxon negligently navigated the EXXON HOUSTON after the breakout.

20. Captain Coyne and all other officers and crew of the EXXON HOUSTON acted at all times relevant to this claim within the scope of their employment with Exxon, and therefore their negligence, if any, is imputed to Exxon for the purpose of this claim. *Jackson Marine Corp. v. Blue Fox*, 845 F.2d 1307, 1309-1310 (5th Cir. 1988).

21. Per the contract signed by Captain Coyne upon his arrival at the SPM, HIRI's General Instructions, Discharging/Loading Orders and Indemnification, dated March 1, 1989 (Joint Trial Exhibit 92), any negligence of Captain Marvin or of the assist vessel NENE is imputed to Exxon for the purpose of this claim. *Kane v. Hawaiian Independent Refinery, Inc.*, 690 F.2d 722, 723 (9th Cir. 1982).

22. When a moving vessel strikes a charted reef, it is presumed that the vessel is at fault. *The Louisiana*, 70 U.S. (3 Wall.) 164, 173 (1865); *Wardell v. Department of Transp.*, 884 F.2d 510, 512 (9th Cir. 1989); *McAllister Bros., Inc. v. United States*, 709 F.Supp. 1237, 1251 (S.D.N.Y.) (charted reef), *aff'd* 890 F.2d 582 (2d Cir. 1989). Because the EXXON HOUSTON stranded on a charted reef, the presumption of *The Louisiana* rule applies.

23. The presumption of fault pursuant to *The Louisiana* rule suffices to make a *prima facie* case against the moving vessel. The presumption does not disappear when conflicting evidence is presented, but must be overcome by a preponderance of the evidence. *Wardell*, 884 F.2d at 513. *The Louisiana* Rule presumption is universally described as "strong", and as one that places a "heavy burden" on the moving ship to overcome. *Id.* at 512-513 (citing *Carr v. Hermosa Amusement Corp., Ltd.*, 137 F.2d 983, 987 (9th Cir. 1943), *cert. denied*, 321 U.S. 764 (1944)).

24. The strong presumption of negligence arising under *The Louisiana* rule can be rebutted by showing, by a preponderance of the evidence, either that the collision was the fault of a stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident. *Wardell*, 884 F.2d at 513 (citing *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1988)); *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985).

25. The EXXON HOUSTON has failed to meet its *Louisiana* rule burden of proving by a preponderance of the evidence that the EXXON HOUSTON acted with reasonable care, or that the stranding was unavoidable. Thus, the court concludes that Exxon was negligent in the navigation of the EXXON HOUSTON on March 2, 1989, and that such negligence was a proximate cause of the stranding.

26. The admiralty law further presumes that when a vessel violates a statutory rule meant to prevent strandings, the violation was a proximate cause of the stranding. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); *Mathes v. The Clipper Fleet*, 774 F.2d 980, 982 (9th Cir. 1985); *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 736 (9th Cir. 1969) (*Pennsylvania* rule applies to strandings).

27. The presumption arising under *The Pennsylvania* rule can be rebutted by a "clear and convincing showing of no proximate cause." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988).

28. At all times relevant to this claim, the Navigation Safety Regulations codified in Part 164 of Title 33 of the Code of Federal Regulations applied mandatorily to the EXXON HOUSTON and her crew. *See* 33 C.F.R. § 164.01.

29. The Navigation Safety Regulations provide in relevant part:

> § 164.11 Navigation Underway: General.
>
> The owner, master or person in charge of each vessel underway shall ensure that:
>
> (a) The wheelhouse is constantly manned by persons who:
>
> (1) Direct and control the movement of the vessel; and
>
> (2) Fix the vessel's position;
>
> . . .
>
> (c) The position of the vessel at each fix is plotted on a chart of the area and the person directing the movement of the vessel is informed of the vessel's position;

33 C.F.R. § 164.11.

30. The rule of *The Pennsylvania* applies to the EXXON HOUSTON. The EXXON HOUSTON was in violation of the following statutory rules designed to prevent strandings:

a. Between 1830 and 2004, while the EXXON HOUSTON was under way approximately one mile or less from the shore of Oahu, Captain Coyne failed to have the position of the vessel fixed and plotted on a navigational chart, in violation of 33 C.F.R. § 164.11(c).

b. Between 1948 and 2000, during which time the EXXON HOUSTON was under way approximately one mile or less from the shore of Oahu, Captain Coyne was the only officer on the bridge, and was not capable of both directing and controlling the movement of the vessel and fixing the vessel's position, in violation of 33 C.F.R. § 164.11(a).

31. Exxon failed to sustain its burden, under *The Pennsylvania* Rule, of proving by clear and convincing evidence that the above-cited statutory violations could not have caused the stranding of the EXXON HOUSTON. Therefore, the court finds that these statutory violations were a proximate cause of the stranding of the EXXON HOUSTON.

32. In the section that follows, the court has also considered whether Captain Coyne's conduct was negligent without applying the *Pennsylvania* or *Louisiana* rules.

33. Exxon has argued that the EXXON HOUSTON was *in extremis* from the time of the breakout to the time of the stranding, and that Captain Coyne's conduct should be judged by that more lenient standard. *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) and subsequent cases.

34. As Captain Coyne's decisions were made calmly, deliberately and without the pressure of an imminent peril, the *in extremis* rule cannot be applied in this case.

35. In considering whether Captain Coyne was negligent, the court has measured his conduct against the standard of "such reasonable care and maritime skill as prudent navigators employ for performance of similar service." *Stevens v. The White City*, 285 U.S. 195 (1932).

36. Captain Coyne acted negligently, unreasonably and in violation of the maritime industry standards in the following instances:

a. He did not deploy sufficient chain to anchor the ship at 1747.

b. He did not request assistance from the Coast Guard or other available ships.

c. He did not attempt to anchor the ship again after 1747. Anchoring the ship would have prevented the hose removal from becoming a distraction to safe navigation.

d. He failed to continue backing the vessel after 1830 until the vessel reached a safe distance from the shore.

e. He chose to linger in the vicinity of a lee shore, only .4 to .6 miles from the actual grounding line.

37. Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

38. Captain Coyne's final starboard turn was grossly and extraordinarily negligent and in violation of the maritime industry standards because he commenced it without knowing the vessel's position.

39. Even if Captain Coyne had known the vessel's position at the onset of the final turn, the turn order was still extraordinarily negligent and in violation of the maritime industry standards because it unnecessarily exposed the vessel to the danger of grounding. In light of the vessel's trim, its maneuvering characteristics, the proximity of the beach, and the weather conditions, the turn was beyond the capability of the vessel. The danger of stranding could and would have been avoided had Captain Coyne backed out or ordered a left turn instead of attempting a right turn.

D. Causation

40. The determination of whether a cause-in-fact was a proximate cause involves a consideration of "public convenience, of public policy, [and] of a rough sense of justice." *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991) (internal quotations and citations omitted).

41. The analysis of proximate cause involves a determination of whether superseding, intervening causes relieve any earlier causes from legal responsibility. *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1137-39 (9th Cir. 1977). A defendant asserting the existence of a superseding intervening cause bears the burden of proving it by a preponderance of the evidence.

42. The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or on the other hand, is or was not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; and

> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts § 442 (cited with approval by *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991)).

43. Determining the causes of the breakout is not necessary to a determination of whether the EXXON HOUSTON's navigation was a superseding, intervening cause of the stranding. When remoteness in time or extraordinarily negligent intervening acts are established, disputed facts regarding the extent of defendant's negligence will not prevent a judgment in favor of defendant. *See, e.g., Gilmore v. Shell Oil Co.*, 613 So.2d 1272 (Ala. 1993); *Greiner v. Whitesboro Sch. Dist.*, 562 N.Y.S.2d 255 (N.Y. App. Div. 1990) (remoteness), *appeal den.*, 557 N.E.2d 1057 (N.Y. 1991); *Brazell v. Board of Educ.*, 557 N.Y.S.2d 645 (N.Y. App. Div. 1990) (extraordinary intervening negligence); *cf. Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 650-53 (5th Cir. 1992) (considering only the factors of the *Restatement (Second) of Torts* § 442 in denying summary judgment motion on superseding, intervening cause).

44. The extraordinary negligence of Captain Coyne in failing to fix and plot his vessel's position superseded any force generated by the breakout of the vessel from the SPM as a cause of the stranding and was the sole proximate cause of the stranding of the EXXON HOUSTON. The analysis of the factors listed in the *Restatement (Second) of Torts* § 442 mandates this conclusion:

a. The failure to plot fixes of the vessel after 1830 caused a fully operational vessel which was at that time free of any encumbrances to her navigation to strand on a charted reef not adjacent to HIRI's SPM. That is a harm different in kind from that which would otherwise have and previously had resulted from a breakout. *Id.* § 442(a). The harm that the breakout risked was that a disabled ship would have been driven onto the shore before it could reach safety. The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger.

b. Both Captain Coyne's failure to plot fixes of his vessel's position after 1830 and the fact that the vessel stranded almost three hours after the breakout are highly extraordinary rather than normal. *Id.* § 442(b).

c. Captain Coyne's failure to plot fixes after 1830 was entirely independent of the fact of breakout; he voluntarily decided not to plot fixes in a situation where he was able to plot fixes. *Id.* § 442(c).

d. The failure to plot fixes after 1830 was solely Captain Coyne's omission in which Defendants did not participate and could not have participated. *Id.* § 442(d). Captain Coyne was aware of the danger of being set toward the lee shore and negligently failed to avoid it. Therefore, Captain Coyne's negligence is viewed as an intervening force and superseding cause which became the sole proximate cause of the stranding.

e. Captain Coyne's failure to plot fixes after 1830 carries a very high degree of culpability. *Id.* § 442(f). It was a voluntary, unforced decision, and it was grossly

negligent and in violation of all applicable industry standards and regulations.

45. Captain Coyne's extraordinary negligence in ordering the final starboard turn was also a superseding, intervening cause. Applying the factors listed in the *Restatement (Second) of Torts* § 442, the court finds as follows:

a. The harm resulting from the final turn was the stranding at a point far from the SPM. The harm that could have resulted from the breakout was a grounding before the ship regained control. These harms are different in kind. *Id.* § 442(a).

b. Captain Coyne's attempt to turn the ship towards the coast was extraordinarily negligent and not a foreseeable consequence of the breakout. *Id.* § 442(b).

c. The decision to make the final turn was made independently of the breakout and was not foreseeable. *Id.* § 442(c).

d. The Defendants did not participate in the decision to turn the ship. *Id.* § 442(d).

e. The final turn was highly culpable and grossly negligent. *Id.* § 442(f).

46. In summary, the Defendants are not legally responsible for the stranding of the EXXON HOUSTON. Although the breaking of the mooring chain imperilled the ship, the EXXON HOUSTON successfully avoided that peril. By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding. Only the grossly negligent actions of its master endangered the vessel further. Captain Coyne inexplicably chose to loiter

in a dangerous area without fixing his position. Then, while overly concerned by an injury to a crew member, he drove the ship onto a charted reef. It would be manifestly unjust to hold anyone legally responsible for the consequences of these acts other than Captain Coyne and his employer, Exxon.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, MAY 20 1993

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

EXXON SHIPPING COMPANY, et al. v. PACIFIC RESOURCES, INC., et al.; Civ. No. 90-00271 HMF; FINDINGS OF FACT AND CONCLUSIONS OF LAW

CASE & LYNCH

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC.; PRI INTERNATIONAL, INC.; and SOFEC, INC., Defendants. and PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC, and PRI INTERNATIONAL INC., Third-Party Plaintiffs, vs.	) CIVIL NO. 90-00271 HMF) NOTICE OF MOTION; MOTION OF DEFENDANT/ THIRD-PARTY DEFENDANT BRIDON FIBRES AND PLASTICS, LTD. TO DIRECT ENTRY OF A FINAL JUDGMENT UPON PLAINTIFFS' CLAIMS FOR DAMAGES CAUSED BY THE GROUNDING OF THE EXXON HOUSTON; MEMORANDUM IN SUPPORT OF MOTION; CERTIFICATE OF SERVICE (Filed Jan. 12, 1994)

BRIDON FIBRES AND PLASTICS, LTD.; GRIFFIN WOODHOUSE, LTD. and WERTH ENGINEERING, INC.,	)	HEARING DATE: MAR 14 1994
	)	HEARING TIME: 10:30 AM
	)	JUDGE: HAROLD M. FONG
Third-Party Defendants.	)	

2120d

NOTICE OF MOTION

TO:

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NOTICE IS HEREBY GIVEN that the above-identified Motion of Defendant/Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Direct Entry of a Final Judgment Upon Plaintiffs' Claims for Damages Caused by the Grounding of the Exxon Houston shall come on for hearing before the Honorable HAROLD M. FONG, Judge of the above-entitled Court, in his courtroom in the United States Courthouse, PJKK Federal Building, 300 Ala Moana Boulevard, Honolulu, Hawaii 96813, on MAR 14, 1994, 1994, at 10:30 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, JAN 12 1994.

/s/ David W. Proudfoot
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Attorneys for Defendant
and Third-Party Defendant
BRIDON FIBRES AND
PLASTICS, LTD.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation),	CIVIL NO. 90-00271 HMF
Plaintiffs,	MOTION OF DEFENDANT/ THIRD-PARTY DEFENDANT BRIDON FIBRES AND PLASTICS, LTD. TO DIRECT ENTRY OF A FINAL JUDGMENT UPON PLAINTIFFS' CLAIMS FOR DAMAGES CAUSED BY THE GROUNDING OF THE EXXON HOUSTON
vs.	
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC.; PRI INTERNATIONAL, INC.; and SOFEC, INC.,	
Defendants.	
and	
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC, and PRI INTERNATIONAL INC.,	
Third-Party Plaintiffs,	

vs.	
BRIDON FIBRES AND PLASTICS, LTD.; GRIFFIN WOODHOUSE, LTD. and WERTH ENGINEERING, INC.,	
Third-Party Defendants.	

2120d

MOTION OF DEFENDANT/THIRD-PARTY DEFENDANT BRIDON FIBRES AND PLASTICS LTD. TO DIRECT ENTRY OF A FINAL JUDGMENT UPON PLAINTIFFS' CLAIMS FOR DAMAGES CAUSED BY THE GROUNDING OF THE EXXON HOUSTON

Comes now Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd., and moves this Court, pursuant to Fed. R. Civ. P. 54(b), to direct entry of a final judgment against Plaintiffs upon their claim for damages caused by the grounding of the EXXON HOUSTON, including the loss of the vessel and the costs of clean-up of the oil spill from the EXXON HOUSTON at the moment of grounding and thereafter.

DATED: Honolulu, Hawaii, JAN 12 1994

/s/ David W. Proudfoot
DAVID W. PROUDFOOT
NENAD KREK
Attorneys for Defendant and
Third-Party Defendant
BRIDON FIBRES AND
PLASTICS, LTD.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC.; PRI INTERNATIONAL, INC.; and SOFEC, INC., Defendants. and PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE INC and PRI INTERNATIONAL INC., Third-Party Plaintiffs, vs. BRIDON FIBRES AND PLASTICS, LTD.; GRIFFIN WOODHOUSE, LTD. and WERTH ENGINEERING, INC., Third-Party Defendants.	CIVIL NO. 90-00271 HMF MEMORANDUM IN SUPPORT OF MOTION

2120d

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This motion is an attempt to move this case toward the most cost-effective final resolution and to avoid a futile and very expensive Phase Two trial. The Court is familiar with the case and only the facts directly relevant to this motion will be reiterated as appropriate in this memorandum.

Rule 54(b) provides in relevant part as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The requirements of Fed. R. Civ. P. 54(b) are clearly met in this instance and it is respectfully requested that the Court exercise its discretion in favor of directing entry of a final judgment upon Exxon's claims for damages caused by the grounding of the EXXON HOUSTON which were fully adjudicated by the Court's Phase One Findings of Fact and Conclusions of Law entered on May 20, 1993 herein.

II. THE COURT CAN DIRECT ENTRY OF A FINAL JUDGMENT ON EXXON'S CLAIM FOR DAMAGES CAUSED BY THE GROUNDING OF THE EXXON HOUSTON

By its Order entered on July 31, 1992 ("Order"), this Court bifurcated the trial in this case

> so that the first phase of the trial will be limited to the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself.

Order at p. 16.

On May 20, 1993, after Phase One of the trial, the Court entered its Findings of Fact and Conclusions of Law, finding Plaintiffs ("Exxon") entirely and solely at fault for the grounding of the EXXON HOUSTON. The Court also found that Exxon's fault was an intervening force which superseded any causation which may have originated from the breakout of the vessel from the Single Point Mooring. These Findings and Conclusions have entirely adjudicated Exxon's $10 Million damage claim for loss of the EXXON HOUSTON. As the Court has expressly found that Exxon was solely at fault for the loss of the vessel, Exxon cannot recover anything on that claim from any of the parties to this case. The Findings and Conclusions have also adjudicated and terminated Exxon's claim for costs of the clean-up of the oil which spilled from the EXXON HOUSTON at the moment of grounding and thereafter.

III. THERE IS NO JUST CAUSE FOR DELAY

In this case, a failure to direct entry of a final judgment at this time would necessitate a futile and disproportionately expensive trial. As there are no compelling reasons not to direct entry of a final judgment, there indeed is "no just reason for delay". An outline of relevant facts is useful here to give the Court the full flavor of the situation.

The Court's Findings and Conclusions plainly eliminated Exxon's entire claim of up to $10 Million for the loss of the EXXON HOUSTON. Moreover, the Findings & Conclusions also eliminated most of Exxon's Phase Two claim of some $2.4 Million for the oil spill clean-up costs. That is because most clean-up items were related to the bunker oil spill caused by the grounding, and the precautionary measures taken by Exxon in anticipation that the tanker might break up on the reef, causing a catastrophic spill. In Bridon's estimate, at most $200,000 of clean up costs was conceivably related to the alleged first spill caused by the breakout and tearing of the oil hoses. While Exxon has never accepted Bridon's analysis, Bridon believes that, for the purposes of this motion, Exxon will not dispute that the value of its remaining Phase Two claims is in the order of magnitude as stated.

To determine and apportion the liability for Exxon's remaining claim of approximately $200,000, the parties would have to go through the extremely expensive discovery and trial of the causation of the breakout of the vessel from the Single Point Mooring. The cost of such discovery and trial would exceed the amount in dispute many times, and conceivably tenfold. Yet, so long as the

Court's Phase One decision remains subject to reversal or change on appeal, the parties could not afford to try the remaining case in a less elaborate fashion consistent with the nominal amount in dispute, because of the potential collateral estoppel effects.

For example, given the $200,000 claim, it would not seem horribly important whether a given Defendant were to end up with zero liability or 25 percent liability for the breakout. However, if, after the final judgment, the Phase One decision were reversed on appeal and it were eventually determined that the grounding was directly caused by the breakout, that Defendant would be facing 25 percent of a $12 Million judgment. In other words a $50,000 judgment would be reincarnated with a vengeance into a $3 Million judgment.

Because of that, the parties cannot afford to try the remaining $200,000 claim as a $200,000 claim. On the other hand, it would be monstrously counter-productive to try a $200,000 claim as if it were a $12 Million claim, just because of a faint chance that Exxon's final appeal might be successful. Such a "trial-by-attrition" would be pointless and a monumental waste of the Court's time. Bridon does not believe that any of the parties, including Exxon, has any desire to burn its money in a futile exercise of that kind.[1]

---

[1] On June 16, 1993, Exxon purported to notice an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(3) from the Court's Findings and Conclusions. Noting probable lack of appellate jurisdiction, Bridon filed a motion to dismiss Exxon's interlocutory appeal. On November 4, 1993 the Court of Appeals for the Ninth Circuit entered an Order summarily dismissing the appeal for lack of appellate jurisdiction.

Bridon had moved to dismiss Exxon's interlocutory appeal solely because of the probable defect in the appellate jurisdiction. Bridon saw no point in briefing an appeal, the result of which could later be set aside by any party unsatisfied by the outcome. In fact, such party could eventually bring an appeal from the final judgment and most likely have it heard by a completely different appellate panel. During the pendency of its motion to dismiss the interlocutory appeal, Bridon suggested to Exxon that it move this Court to direct entry of final judgment upon its Findings and Conclusions pursuant to Rule 54(b), and thus shore up the appellate jurisdiction. Exxon, however, declined to do so at that time. Indeed, recent caselaw seems to view such practice with disfavor.

V. CONCLUSION

It is respectfully requested that the Court determine that there is no just reason for delay, and that it direct entry of a final judgment upon Exxon's claim damages caused by the grounding of the EXXON HOUSTON, including the loss of the vessel and the costs of clean-up of the spill of oil from the EXXON HOUSTON at the moment of grounding and thereafter.

DATED: Honolulu, Hawaii, JAN 12 1994.

/s/ Nenad Krek
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NENAD KREK
Attorneys for Defendant and
Third-Party Defendant
BRIDON FIBRES AND
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(Certificate of Service omitted in printing.)

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EXXON SHIPPING COMPANY, INC.
and EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation),	) CIVIL NO. 90-00271 HMF) IN ADMIRALTY)
Plaintiffs,	) NOTICE OF MOTION;
vs.	) MOTION OF PLAINTIFFS TO) DIRECT ENTRY OF A FINAL) JUDGMENT UPON THE) FINDINGS OF FACT AND) CONCLUSIONS OF LAW) ENTERED ON MAY 20, 1993,) AND FOR A STAY;) MEMORANDUM IN) SUPPORT OF MOTION;) CERTIFICATE OF SERVICE
PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.,	)
Defendants.	) (Filed Feb. 22, 1994))) Hearing Date: March 14, 1994) Hearing Time: 10:30 a.m.) Hearing Judge: Harold M. Fong

NOTICE OF MOTION

TO:

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Attorney for Third-Party Defendant
GRIFFIN WOODHOUSE, LTD.

NOTICE IS HEREBY GIVEN that the above-identified Motion Of Plaintiffs To Direct Entry Of A Final Judgment Upon The Findings Of Fact And Conclusions Of Law Entered on May 20, 1993, And For A Stay shall come on for hearing before the Honorable Harold M. Fong, Judge of the above-entitled Court, in his courtroom in the United States Courthouse, PJKK Federal Building, 300 Ala Moana Boulevard, Honolulu, Hawaii 96813, on March 14, 1994, at 10:30 o'clock a.m., or as soon thereafter as counsel may be heard.

Dated: Honolulu, Hawaii FEB 22 1994

/s/ Judy S. Givens
JUDY S. GIVENS
of Attorneys for Plaintiffs
EXXON SHIPPING COMPANY, INC.
and EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation)	) CIVIL NO. 90-00271 HMF) IN ADMIRALTY
Plaintiffs,	) MOTION OF PLAINTIFFS) TO DIRECT ENTRY OF A) FINAL JUDGMENT) UPON THE FINDINGS
vs.	) OF FACT AND
PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.,	) CONCLUSIONS OF LAW) ENTERED ON MAY 20,) 1993, AND FOR A STAY
Defendants,	
and	
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC.,	
Third-Party Plaintiffs,	
vs.	
BRIDON FIBRES AND PLASTICS, LTD., and GRIFFIN WOODHOUSE, LTD.	
Third-Party Defendants.	

MOTION OF PLAINTIFFS TO DIRECT ENTRY OF A FINAL JUDGMENT UPON THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED ON MAY 20, 1993 AND FOR A STAY

Plaintiffs, by and through their undersigned counsel, hereby move the court, pursuant to L.R. 220-9 and Fed. R. Civ. P. 54(b), to direct entry of final judgment upon the Findings of Fact and Conclusions of Law entered by the court on May 20, 1993, and, pursuant to the court's inherent powers, to stay further proceedings in this court until plaintiffs' appeal of the certified judgment has been decided or otherwise disposed of.

Dated: Honolulu, Hawaii FEB 22 1994

/s/ Judy S. Givens
JUDY S. GIVENS
of Attorneys for Plaintiffs
EXXON SHIPPING COMPANY, INC.
and EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation),	) CIVIL NO. 90-00271 HMF) IN ADMIRALTY
Plaintiffs,	) MEMORANDUM IN
vs.	) SUPPORT OF MOTION
PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.,	)
Defendants,	)
and	)
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC.,	)
Third-Party Plaintiffs,	)
vs.	)
BRIDON FIBRES AND PLASTICS, LTD., and GRIFFIN WOODHOUSE, LTD.	)
Third-party Defendants.	)

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION.

It would best serve judicial economy, and is also in the best interests of all parties to this litigation, to have the issues raised by the bifurcation of the trial of this matter and by the decision entered following the first phase of trial reviewed and decided by the Court of Appeals before the second phase is tried.

If Bridon's motion is granted, there is a significant risk that the Court of Appeals would find it lacked jurisdiction, for the reasons set forth in plaintiffs' memorandum in opposition to that motion.

However, the Ninth Circuit has displayed a willingness to allow Rule 54(b) certification of orders which may not finally adjudicate a claim when appeal of such issues would best serve efficient judicial administration.

The Ninth Circuit is most likely to find that it has jurisdiction of an appeal of the Findings of Fact and Conclusions of Law if this court directs entry of final judgement on the basis that the legal issues involved are severable and that certification will result in efficient judicial administration.

II. DISCUSSION.

A. THE NINTH CIRCUIT HAS RELAXED THE REQUIREMENT OF A FINAL JUDGMENT IN CASES IN WHICH IMMEDIATE APPELLATE REVIEW WOULD BEST SERVE JUDICIAL EFFICIENCY.

In *Arizona State Carpenters Pension Trust Fund v. Miller,* 938 F.2d 1038 (9th Cir., 1991) the Ninth Circuit

reaffirmed its adherence to the traditional Rule 54(b) requirement that at least one but fewer than all claims in multiclaim litigation be finally decided.

However, in *Continental Airlines v. Goodyear Tire & Rubber Co.* 819 F.2d 1519 (9th Cir. 1987), after first paying lip service to that Rule 54(b) requirement, the court abandoned the requirement as unworkable. The court declared that while it was confident that the case involved multiple claims, it was not certain that any claim had been finally adjudicated, noting that "the essence [of a claim] eludes the grasp like quicksilver." 819 F.2d at 1525.

Rather than engaging in the "subtle jurisprudence" involved in determining what constitutes a claim for purposes of Rule 54(b), the court adopted a "pragmatic approach focusing on severability and efficient judicial administration." *Id.*

After noting that the summary judgments certified by the district court had "eliminated none of the parties and left open potentially full recovery in both of Continental's ultimate areas of loss" and acknowledging the possibility that Continental might not have needed to appeal the partial summary judgments that were the subject of the Rule 54(b) certification had the matter proceeded to trial, the court held:

> Nonetheless, given the size and complexity of this case, we cannot condemn the district court's effort to carve out threshold claims and thus streamline further litigation. In these partial summary judgments, the district court effectively narrowed the issues, shortened any subsequent trial by months, and efficiently separated

> the legal from the factual questions. The matters disposed of by the partial summary judgments were sufficiently severable factually and legally from the remaining matters, and they completely extinguished the liability of the tire companies as to the airplane damage claim. We hold that Rule 54(b) certification was proper under the circumstances of this case.
>
> 819 F.2d at 1525.

In this case, Griffin's motion to bifurcate was granted in an effort to carve out threshold claims and thus streamline further litigation. The bifurcation had the effect of shortening trial by at least a month.

Exxon strongly opposed the manner in which trial was bifurcated on the basis that without evidence of events occurring before the second hose parted Exxon would be unable to prove its claims and would thus be severely prejudiced. The manner in which trial was bifurcated will be a primary focus of Exxon's appeal. The fact that the trial was bifurcated and Exxon's objection to the manner in which trial was bifurcated make the Findings of Fact and Conclusions of Law entered following the first phase of trial a particularly appropriate decision for certification. If, as Exxon contends, the bifurcation was improper, the trial of the remaining issues before appellate review of the bifurcation would be a tremendous waste of time and resources.

Although different panels of the Ninth Circuit have applied both Rule 54(b) and *Continental* differently[1], a recent en banc decision relied on *Continental's* expansive interpretation of Rule 54(b).

In *Hale v. State of Arizona* 993 F.2d 1387 at 1390 (9th Cir., 1993) cert. denied, 114 S.Ct. 386 (1993)[2], the court, sitting en banc, cited *Continental* in support of its finding of jurisdiction, noting that *Continental* "expansively [construed the] discretion of [the] district court in entering partial summary judgment under Rule 54(b)."

It appears that the Ninth Circuit is willing to relax the requirement of a final judgment in complex cases where immediate appellate review will streamline further litigation.

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[1] *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, decided July 15, 1991, and amended August 27, 1991, cites *Continental* in support of the traditional prerequisites to entry of final judgment pursuant to Rule 54(b): claims must be multiple and at least one must have been finally adjudicated. 938 F.2d 1039. A different panel of the Ninth Circuit decided *Texaco, Inc. v. Ponsoldt* 939 F.2d 794 on July 25, 1991. The *Texaco* panel cited *Continental* for its holding that certification was proper even if no claim had been finally decided if certification would streamline litigation. 939 F.2d at 798.

[2] *Hale* involved review of two district court decisions, one of which was final and found that prisoners were "employees" for purposes of the Fair Labor Standards Act and the second of which dismissed a number of prisoner claims based upon the Fair Labor Standards Act for lack of jurisdiction, retaining one claim for prospective relief pending the outcome of the appeal. In the second case, the court had entered 54(b) final judgment as to the dismissed claims.

B. JUDICIAL ECONOMY WOULD BE BEST SERVED BY STAYING FURTHER PROCEEDINGS UNTIL THE APPEAL HAS BEEN DECIDED.

The court has inherent power to stay proceedings until the Court of Appeals has issued a decision on Exxon's appeal or until the appeal has been otherwise terminated. *Landis v. North Am. Co.* 299 U.S. 248, 254 (1936).

While Exxon disagrees with Bridon's description of the effect of the Findings of Fact and Conclusions of Law and with its valuation of Exxon's oil spill clean-up claim, Exxon otherwise adopts the argument set forth in Section III of Bridon's Memorandum, pp. 3-5, in support of its motion for a stay.

III. CONCLUSION.

The Findings of Fact and Conclusions of Law entered in this case on May 20, 1993, are not suitable for entry of final judgment pursuant to Rule 54(b) as that Rule has traditionally been interpreted. It is very likely, however, that the Court of Appeals would find certification proper if an order entering final judgment included findings that certification would streamline further litigation and serve the interests of judicial efficiency.

It is respectfully requested that the Court determine that entry of final judgment with respect to the Findings of Fact and Conclusions of Law will result in efficient judicial administration, that the legal issues involved are severable and that there is no just reason for delay, and

that it direct entry of final judgment on the Findings of Fact and Conclusions of Law entered on May 20, 1993.

Dated: Honolulu, Hawaii FEB 22 1994

/s/ Judy S. Givens
JUDY S. GIVENS
of Attorneys for Plaintiffs
EXXON SHIPPING COMPANY, INC.
and EXXON COMPANY, U.S.A.

(Certificate of Service omitted in printing.)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation),	) CIVIL NO. 90-00271 HMF
Plaintiffs,	
vs.	
PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC.; and SOFEC, INC.,	
Defendants.	
and	

) ORDER DIRECTING
) ENTRY OF A FINAL
) JUDGMENT PURSUANT
) TO FED. R. CIV. P. 54(b)
) UPON LESS THAN ALL
) CLAIMS AND AS TO
) LESS THAN ALL
) PARTIES
)
) (Filed Mar. 31, 1994)
)
) HEARING
)
) DATE: March 14, 1994
) TIME: 10:30 a.m.
) JUDGE: Honorable
) Harold M. Fong
)

PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; and PRI INTERNATIONAL, INC.,	)
Third-Party Plaintiffs,	
vs.	
BRIDON FIBRES AND PLASTICS, LTD.; GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.,	
Third-Party Defendants.	

ORDER DIRECTING ENTRY OF A FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b) UPON LESS THAN ALL OF CLAIMS AND AS TO LESS THAN ALL PARTIES

This cause came up for a hearing on Monday, March 14, 1994 at 10:30 a.m. before the Honorable Harold M. Fong, United States District Judge, upon a Motion of Defendant Bridon Fibres And Plastics, Ltd. To Direct Entry Of A Final Judgment Upon Plaintiffs' Claims For Damages Caused By The Grounding Of The Exxon Houston, and a (Cross-)Motion Of Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A. To Direct Entry Of A Final Judgment Upon The Findings Of Fact And Conclusions Of Law Entered On May 20, 1993, And For A Stay. Nenad Krek, Esq., appeared on behalf of

Defendant Bridon Fibres and Plastics, Ltd., Judy S. Givens, Esq., appeared on behalf of Plaintiffs, Randall K. Schmitt, Esq., appeared on behalf of Defendant Sofec, Inc., Howard G. McPherson, Esq., appeared on behalf of Defendant Griffin Woodhouse, Ltd., and Janine R. Kimball, Esq., appeared on behalf of Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc. The Court has reviewed memoranda submitted by the parties, has received oral argument of counsel and has been in all respects fully briefed.

In its Findings of Fact and Conclusions of Law, entered on May 20, 1993, the Court determined that the negligence of Plaintiffs "superseded any force generated by the breakout of the vessel from the SPM as a cause of the stranding and was the sole proximate cause of the stranding of the EXXON HOUSTON" (CL 44). *See also* CL 45 and CL 46. The Court finds that said Findings of Fact and Conclusions of Law have fully adjudicated all Plaintiffs' claims for damages caused by the stranding of the EXXON HOUSTON, i.e., all of Plaintiffs' claims against all other parties for the loss of the vessel, and all of Plaintiffs' claims against Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., for recovery of the costs of clean-up of the bunker oil spill which resulted from the stranding.

The Court further finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay of entry of a final judgment on those fully adjudicated claims. The issues and claims disposed of by the Court's Findings of Fact and Conclusions of Law are factually and legally

separable from the remaining issues and claims. Moreover, the Court finds that, given the size and complexity of this case, direction of entry of a final judgment is necessary at this time in order to promote efficient judicial administration and streamline further litigation.

Now, therefore, good cause appearing, it is hereby

ORDERED, ADJUDGED and DECREED that:

1. Pursuant to Fed. R. Civ. P. 54(b), it is expressly determined that there is no just cause for delay of the entry of a final judgment herein.

2. The Clerk of this Court is directed to enter a final judgment against Plaintiffs on all causes of action stated in their Complaint as follows:

A. In favor of all Defendants on Plaintiffs' claim for damages to and loss of the EXXON HOUSTON; and

B. In favor of Defendants Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., on Plaintiffs' claim for recovery of costs of clean-up of the bunker oil spill.

DATED: Honolulu, Hawaii, MAR 31 1994.

HAROLD M. FONG
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Judy S. Givens
JUDY S. GIVENS ESQ.
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EXXON SHIPPING COMPANY, INC. and
EXXON COMPANY, U.S.A

/s/ Randall K. Schmitt
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Attorney for Defendant
SOFEC, INC.

/s/ H. G. McPherson
HOWARD G. McPHERSON, ESQ.
Attorney for Third-Party Defendant
GRIFFIN WOODHOUSE, LTD.

/s/ Janine Kimball
JANINE KIMBALL, ESQ.
Attorney for Defendants
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INDEPENDENT REFINERY, INC., PRI
MARINE, INC. and PRI INTERNATIONAL, INC.

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

EXXON SHIPPING COMPANY, et al.,	JUDGMENT IN A CIVIL CASE
Plaintiffs,	
V.	
PACIFIC RESOURCES, INC., et al.,	CASE NUMBER: 90-00271HMF
Defendants.	(Filed Apr. 20, 1994)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to Fed. R. Civ. P. 54(b), final judgment is hereby entered against plaintiffs on all causes of action stated in their complaint as follows:

A. In favor of all Defendants on Plaintiffs' claim for damages to and loss of the Exxon Houston; and

B. In favor of Defendants Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., on Plaintiffs' claim for recovery of costs of clean-up of the bunker oil spill.

APR 20 1994 /s/ Walter A. Y. H. Chinn
Date *Clerk*

cc:all parties

(By) Deputy Clerk

Of Counsel:
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Attorneys for Plaintiffs
EXXON SHIPPING COMPANY, INC.
and EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation), Plaintiffs, vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC., Defendants, and	CIVIL NO. 90-00271 HMF (In Admiralty) NOTICE OF APPEAL BY PLAINTIFFS EXXON SHIPPING COMPANY, INC. AND EXXON COMPANY, U.S.A.; CERTIFICATE OF SERVICE (Filed Apr. 25, 1994)

PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC.,

Third-Party Plaintiffs,

vs.

BRIDON FIBRES AND PLASTICS, LTD., and GRIFFIN WOODHOUSE, LTD.

Third-Party Defendants.

NOTICE OF APPEAL BY PLAINTIFFS EXXON SHIPPING COMPANY, INC. AND EXXON COMPANY, U.S.A.

Notice is hereby given that Plaintiffs EXXON SHIPPING COMPANY, INC. and EXXON COMPANY, U.S.A. ("EXXON"), by and through their attorneys Fukunaga Matayoshi Hershey Kuriyama & Ching, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on April 20, 1994.

Dated: Honolulu, Hawaii APR 25 1994

/s/ Judy S Givens
JUDY S. GIVENS
of Attorneys for Plaintiffs
EXXON SHIPPING COMPANY, INC.
and EXXON COMPANY, U.S.A.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EXXON COMPANY; EXXON SHIPPING COMPANY,

Plaintiffs-Counter-defendants-Third-Party Defendants-Appellants,

v.

SOFEC, INC.,

Defendant-Counter-claimant-Appellee,

PACIFIC RESOURCES, INC.; HAWAIIAN INDEPENDENT REFINERY, INC.; PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

Defendants-Cross-claimants-Third-Party Plaintiffs-Appellees,

v.

GRIFFIN WOODHOUSE, Griffin Woodhouse, Inc.,

Third-Party Defendant-Appellee,

BRIDON FIBRES AND PLASTICS, LTD.,

Defendant-Third-Party Defendant-Appellee.

No. 94-15806

D.C. No. CV-90-0271-HMF

OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, Chief District Judge, Presiding

Argued and Submitted
March 14, 1995 – San Francisco, California

Filed April 26, 1995

Before: William C. Canby, Jr., Charles Wiggins,
and Thomas G. Nelson, Circuit Judges.

Opinion by T.G. Nelson

SUMMARY

Admiralty and Marine/Negligence/ Civil Litigation and Procedure

The court of appeals affirmed a district court order. The court held that the district court did not err in finding a captain's extraordinary negligence to be the sole proximate and superseding cause of damage to a vessel that broke away from a mooring system and later ran aground.

The Exxon *Houston*, a tanker belonging to appellants Exxon Shipping Co. and Exxon Company U.S.A. (Collectively, Exxon), broke away from a Single Point Mooring System (SPM) manufactured by appellee Sofec, Inc. and sold by appellee Pacific Resources, Inc. and associated corporations (collectively, HIRI). A storm had caused a break in the chafe chain linking the vessel to the SPM. As the vessel drifted, two oil hoses broke away from the SPM, and one hose interfered with the ship's ability to maneuver.

Immediately after the second hose parted (the "breakaway"), the Coast Guard contacted the *Houston* to see whether it needed assistance. Captain Kevin Coyne refused the offer. During the 2 hours and 4 minutes following the breakout, Coyne took the ship through a series of phases including an attempt to anchor. Coyne failed to plot the ship's position on the chart for a period of time, relying entirely on parallel indexing. For a time, Captain Coyne was alone on the bridge. He proceeded to make a final turn toward shore, which resulted in the ship's stranding. The ship ran aground.

Exxon filed a complaint in admiralty against HIRI and Sofec for the loss of its ship and cargo, and for oil spill cleanup costs. HIRI filed a third-party complaint against appellees Bridon Fibres and Plastics, Ltd. and Griffin Wo[illegible]house, Ltd. Griffin moved to bifurcate the trial, and a[illegible] defendants joined the motion. The district court granted the motion, limiting the first phase of the trial to the issue of causation with respect to the *Houston's* grounding, leaving the issue of causation with respect to the breakout for Phase Two.

The district court found that Coyne's extraordinary negligence was the sole proximate and superseding cause of the ship's grounding. Following motions by Bridon and Exxon, the court entered a final motion precluding all of Exxon's claims for loss of the vessel. Exxon appealed, contending that the district court improperly bifurcated the proceedings and that the doctrine of superseding cause has not application to cases in admiralty.

[1] In *United States v. Reliable Transfer Co.*, the Supreme Court rejected the rule whereby damages were divided equally between or among negligent vessels regardless of the degree of fault attributable to each. [2] The Ninth Circuit has affirmed the continuing viability of superseding cause in the maritime context. The Ninth Circuit previously held that an intervening force supersedes prior negligence where the subsequent actor's negligence was "extraordinary." [3] Thus, superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. The district court did not "disobey" *Reliable Transfer* in employing the concept of superseding cause in this case.

[4] Exxon was incorrect in arguing that it was unfairly prejudiced by the bifurcation. [5] The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. [6] Moreover, even if Exxon's theory that the HIRI defendants were strictly liable as warrantors of safe berth was accepted, such a finding would not have rendered erroneous either the district court's bifurcation of the trial or its superseding cause analysis. [7] The district court's decision to bifurcate the trial could not be said to have "severed the unseverable" or to have prejudiced Exxon. Bifurcation of the trial was expeditious and appropriate in light of the circumstances of the case.

[8] Under the rule of *The Louisiana*, when a moving vessel strikes a charted reef, it is presumed the vessel is at fault. [9] *The Pennsylvania* stands for the presumption that when a vessel violates a statutory rule meant to prevent

strandings, the violation was a proximate cause of the stranding. [10] In this case, the *Houston* struck a charted reef because her captain had not bothered to fix her position. Exxon neither rebutted nor offered any compelling reason to ignore the traditional admiralty rules laid out in *The Pennsylvania* and *The Louisiana*.

[11] In addition, the district court did not err in holding Coyne to a reasonable standard of care. [12] The district court's finding that Coyne's failure to take fixes was extraordinarily negligent was supported by the record. [13] The district court's finding that the final starboard turn was extraordinarily negligent was also supported by the record. [14] The district court did not clearly err in finding that Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout.

COUNSEL

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George W. Playdon, Jr., Reinwald, O'Connor, Marrack, Hoskins & Playdon, Honolulu, Hawaii, for defendants-cross-claimants-third-party-plaintiffs-appellees Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc.

David W. Proudfoot, Case & Lynch, Honolulu, Hawaii, for defendant-third-party-defendant-appellee Bridon Fibres and Plastics, Ltd.

OPINION

T.G. NELSON, Circuit Judge:

OVERVIEW

Exxon Shipping Co. and Exxon Company U.S.A. (collectively, "Exxon") appeal the district court's judgment following a bench trial in Exxon's admiralty action seeking damages for loss of its tanker, the Exxon *Houston*, and costs of oil spill cleanup and loss of cargo. Exxon maintains that the failure of a Single Point Mooring System ("SPM") manufactured by defendant Sofec and sold by defendants Pacific Resources, Inc. and associated corporations (collectively, "HIRI"[1]) was the actual and proximate cause of its losses. The district court found in Phase One of a bifurcated proceeding that Exxon's negligence superseded any damage caused by the failure of the SPM, and was the sole proximate cause of the *Houston's* stranding. On appeal, Exxon argues that the district court improperly bifurcated the proceedings and that the doctrine of superseding cause has no application to cases in admiralty. We affirm the district court's order.

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[1] We follow the district court's designation of the defendant corporations, which include Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc., as "HIRI."

FACTS

This case arises from the stranding of the Exxon *Houston* on March 2, 1989, near the Island of Oahu, several hours after it broke away from an SPM owned and operated by defendants HIRI. The *Houston*, a steam propulsion oil tanker weighing over 72,000 dead weight tons, was engaged in delivering oil via two floating hoses into HIRI's submerged pipeline, pursuant to a contract between Exxon and defendant Pacific Resources International, Inc. ("PRII"), when a heavy southern storm (locally termed a Kona storm) caused a break in the chafe chain linking the vessel to the SPM. As the vessel drifted, the two oil hoses broke away from the SPM. Because the hoses were bolted to the ship rather than secured by more readily detachable safety locks, a long (800 feet) length of one hose remained attached to the ship, and interfered with her ability to maneuver.

While the parting of the first hose did not cause a significant threat to the *Houston*, the parting and partial sinking of the second, longer hose, weighed down by a heavy piece of spool torn from the SPM, threatened to foul the ship's propeller. The parting of the second hose at approximately 1728,[2] designated as the "breakout" or "breakaway," is the initiating point in time for events covered in the Phase One trial.

Immediately after the breakout, the Coast Guard contacted the *Houston* to see whether it needed assistance, but because he was advised assistance vessels would not

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[2] The equivalent local time was 5:28 p.m. In keeping with the record, we refer to nautical time in this opinion.

arrive within two hours, Captain Coyne refused the offer, thinking the problem would be resolved within that time. Captain Coyne did not thereafter request assistance from the Coast Guard. During the two hours and forty-one minutes following the breakout, the *Houston's* Captain, Kevin Coyne, took the ship through a series of phases described in some detail in the district court's findings of fact. These phases are summarized in the following paragraphs.

At about 1740, Captain Coyne attempted to anchor, dropping a single anchor which paid out one shot (90 feet) of chain. On the basis of expert testimony, the district court found that Captain Coyne failed to follow standard maritime practice, which would have involved releasing five to six shots of chain to hold the ship under the circumstances. The *Houston* had twelve shots of chain available for each of its two anchors. After this attempt to anchor failed, Captain Coyne made no further efforts to anchor the *Houston* before it stranded, although the district court found there were numerous places en route he could safely have done so.

By 1803, the small assist vessel *Nene* was able, with the assistance of the *Houston*, to get control of the end of the second hose so that it was no longer a threat to the larger ship. Captain Coyne controlled the *Nene's* movements as necessary to coordinate with the *Houston's* movements. Between 1803 and 1830, Captain Coyne maneuvered the *Houston* out to sea and away from shallow water.

Between 1830 and 2009, the time of stranding, the district court found that Captain Coyne made a series of

ill-advised moves. Perhaps most significant was his failure to plot the ship's position on the chart between 1830 and 2004. Rather than plotting fixes of the vessel's position at regular intervals, Captain Coyne relied after 1830 entirely on parallel indexing, a supplemental technique which, according to Exxon's Navigation and Bridge Organization Manual ("Navigation Manual"), "does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes." Without a fix, Captain Coyne was unable to make effective use of the chart to check for hazards.

Between 1830 and 1947, the crews of the *Houston* and the *Nene* worked to disconnect the second hose from the *Houston*. This was accomplished by 1947. The *Houston's* port crane collapsed in the process, taking the crane operator's seat with it onto the deck. The second mate went below to attend to the crane operator, who was in shock, leaving Captain Coyne alone on the bridge at 1948. Although the Navigational Manual requires that at least two officers be present on the bridge at all times, Captain Coyne did not call upon any of the other available officers to join him until 2000. The district court found that if the bridge had been properly manned, the stranding danger would have been avoided.

Finally, at 1956, Captain Coyne made a disastrous final turn to the right (toward the shore) which resulted in the ship's stranding. Given that the Kona storm was threatening to push the vessel into shore, it is not clear why the Captain chose to turn right instead of continuing to back out safely to sea, or turning to port, away from the coast. Both options were viable. The district court found Captain Coyne's explanations for his decision

unconvincing. Because he had not taken fixes, Captain Coyne apparently was unaware of the ship's position until he ordered Third Mate Spiller to do so at 2004. Third Mate Spiller testified that on seeing the 2004 fix on the chart, Captain Coyne uttered an expletive and immediately ordered an increased speed. Moments later the ship ran aground on a reef near the shore.

PROCEDURAL HISTORY

In April, 1990, Exxon filed its complaint in admiralty against HIRI and Sofec (the manufacturer of the SPM) for the loss of its ship and cargo, and for oil spill cleanup costs. HIRI filed a third-party complaint against Bridon Fibres and Plastics, Ltd. ("Bridon"), and Griffin Woodhouse, Ltd. ("Griffin").[3] On June 3, 1992, Griffin moved to bifurcate the trial. All defendants joined the motion. The district court granted the motion on July 31, 1992, limiting the first phase of the trial to the issue of causation with respect to the *Houston's* grounding, leaving the issue of causation with respect to the breakout for Phase Two.

After conducting a bench trial in admiralty between February 9, 1993, and March 3, 1993, the district court found that Captain Coyne's (and by imputation, Exxon's) extraordinary negligence was the sole proximate and superseding cause of the *Houston's* grounding. Exxon filed an appeal on June 16, 1993, which was dismissed for lack of a final judgment. Following motions by Bridon and Exxon, the district court entered a final motion precluding all of Exxon's claims for loss of the vessel on

[3] A third company which was dismissed without prejudice.

April 20, 1994. We have jurisdiction over Exxon's subsequent timely appeal pursuant to 28 U.S.C. § 1291, and we affirm the judgment.

ANALYSIS

A. *Applicability of superseding cause in admiralty.*

[1] The district court's conclusions of law are reviewed *de novo*. *Havens v. F/T Polar Mist*, 996 F.2d 215, 217, 1994 A.M.C. 605 (9th Cir. 1993). Exxon argues that the Supreme Court's holding in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), replacing the historical divided damages rule in favor of comparative negligence in admiralty cases, vitiates the use of concepts such as intervening force and superseding cause. In *Reliable Transfer*, the Court rejected the rule whereby damages were divided equally between or among negligent vessels (usually in collision cases) regardless of the degree of fault attributable to each. *Id.* at 397, 411. In concluding, the Court stated that:

> [W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only . . . when it is not possible fairly to measure the comparative degree of their fault.

Id. at 411.

In the wake of *Reliable Transfer*, the circuits have considered with sometimes conflicting results the issue of

whether superseding cause may still be used to attribute fault in admiralty cases. In *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), on which Exxon relies, the Eleventh Circuit appears to have held the doctrine of superseding cause inapplicable in the maritime context after *Reliable Transfer*. Rejecting appellee's argument that its negligence was not a proximate cause of the accident in question, the *Hercules* court stated:

> The doctrines of intervening cause and last clear chance, like those of "major-minor" and "active-passive" negligence, operated in maritime collision cases to ameliorate the . . . so-called "divided damages" rule [rejected by the Supreme Court in *Reliable Transfer*]. . . .
>
> Under a "proportional fault" system, no justification exists for applying the[se] doctrines. . . . Unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment . . . is the proper method for calculating and awarding damages in maritime cases.

765 F.2d at 1075.

While *Hercules* was understood by the Eighth Circuit to reject the role of superseding cause altogether in maritime cases, *Lone Star Industries, Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1458 (8th Cir. 1991), it is not entirely clear whether in rejecting intervening cause the Eleventh Circuit meant merely to reject "normal intervening cause" as defined by Restatement (Second) of Torts ("Restatement") section 443, or whether it meant also to reject "superseding cause" as defined by Restatement section

440.[4] Given that the *Hercules* court explicitly rules that appellee's underlying actions were a proximate cause (as

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[4] Section 440 of the Restatement (Second) of Torts defines superseding cause as:

> an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

Comment b adds:

> A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm.

Section 441 defines intervening force as:

> one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.

Section 443 on "normal intervening force" states that:

> [t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm. . . .

Section 442 lays out factors for determining whether an intervening force is a superseding cause:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
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> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

well as a cause in fact) of the damage, it is plausible that the court would not have ruled out a defense based on superseding cause as the sole proximate cause of the damage.

[2] It is not necessary to resolve here whether the Eleventh Circuit has proscribed the use of superseding cause in admiralty. Several other circuits, most importantly this one, have affirmed the continuing viability of superseding cause in the maritime context. In *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497, 1991 A.M.C. 1217 (9th Cir. 1991), we held that an intervening force supersedes prior negligence where the subsequent actor's negligence was "extraordinary" (defined as "neither normal nor reasonably foreseeable"). Thus, a ship's failure to stand by and offer assistance to the sinking vessel with which it had collided was deemed the sole proximate cause of injury to a rescuing vessel's crewman, even though both of the colliding vessels were causes-in-fact of the collision. *Id.* at 496-97. Accordingly, we held the departing vessel "solely responsible" for the injuries of the seaman aboard the rescuing vessel. *Id.* at 498. *See also Protectus Alpha Navigation Co. v. Northern Pac. Grain Growers*, 767 F.2d 1379, 1384, 1986 A.M.C. 56 (9th Cir. 1985) (indicating in dicta that application of the principle

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> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts §§440-42 (1965).

of superseding cause in a maritime case "would not have been improper."); *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455, 466, 1984 A.M.C. 2920 (5th Cir.) (indicating that superseding cause might come into play in admiralty), *cert. denied*, 469 U.S. 832 (1984); *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652, 1994 A.M.C. 512 (5th Cir. 1992) (holding that "the doctrine of superseding negligence in maritime cases . . . retains its vitality"); *and cf. Lone Star*, 927 F.2d at 1458-60 (rejecting the *Hercules* approach and applying superseding cause in a case involving ordinary (as opposed to extraordinary) negligence).

[3] We hereby reaffirm that superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. We therefore hold that the district court did not "disobey" *Reliable Transfer* in employing the concept of superseding cause in this case.

B. *The decision to bifurcate.*

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. *Counts v. Burlington N. R.R.*, 952 F.2d 1136, 1139 (9th Cir. 1991). Rule 42 of the Federal Rules of Civil Procedure provides in pertinent part:

> [t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, . . . third party claim, or of any separate issue or of any number of claims . . . or issues, always preserving inviolate the right of trial by jury.

[4] Exxon argues that the district court's decision to bifurcate the trial, and to limit Phase One to the issue of causation after the breakout, denied Exxon due process and deprived it of a fair trial by foreclosing it from presenting its case-in-chief. Because it maintains that the issues of causation, from breakout to grounding, are inseverable, Exxon avers that it was unfairly prejudiced by the bifurcation. We do not agree.

[5] The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. There was thus no need in Phase One for Exxon to establish HIRI's fault in causing the breakout. Rather, Exxon had the burden of proving that the forces set in motion by the breakout were the proximate cause of the grounding. HIRI had the burden of showing by a preponderance of the evidence that Captain Coyne's actions subsequent to the breakout were the sole proximate or superseding cause of the grounding of the vessel, such that the defendant parties were relieved of liability for the *Houston*'s loss.[5]

As the district court noted in its order granting the motion to bifurcate, if it did not find Captain Coyne's navigation after the breakout to be the sole proximate or superseding cause of the grounding, it could "still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel." The district court noted, too, that it was "well aware of

[5] We find Exxon's argument that the district court improperly allocated the burdens of proof to be without merit.

the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury." After a lengthy bench trial, the district court found that Captain Coyne's extraordinary negligence was the sole proximate cause of the grounding of the *Houston*, obviating any need to make a comparative analysis of fault regarding the loss of the ship. "The principles of comparative negligence are not applicable when damages can be apportioned to separate causes based on evidence in the record." *Protectus Alpha*, 767 F.2d at 1383.

[6] Exxon also argues that the district court erred in holding that the safe berth clause in the contract between HIRI and Exxon imposed a duty of due diligence rather than one of strict liability upon the defendants.[6] Had the district court applied the strict liability standard, Exxon indirectly avers, it could not have bifurcated the trial or upheld HIRI's superseding cause defense. We find it unnecessary to decide here which standard of care is appropriate in this context; even were we to accept Exxon's theory that the HIRI defendants were strictly liable as warrantors of safe berth, such a finding would not render erroneous either the district court's bifurcation of the trial, or its superseding cause analysis.

Where, as here, the district court finds the injured party to be the superseding or *sole* proximate cause of the damage complained of, it cannot recover from a party whose actions or omissions are deemed to be causes in

[6] Exxon does not dispute the district court's finding that the defendants met the duty of due diligence in all respects.

fact, but not legal causes of the damage, regardless of whether that party's liability is premised on negligence or strict liability. *See* Restatement (Second) of Torts § 440 cmt. b (1965) ("superseding cause relieves the actor of liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm"); *and see In re Related Asbestos Cases*, 543 F.Supp. 1142, 1150 (N.D. Cal. 1982) (holding the defense of superseding cause applicable in cases of strict liability in tort.)

[7] Given the viability of the superseding cause doctrine in cases such as this one, the district court's decision to bifurcate the trial cannot be said to have "severed the unseverable" or to have prejudiced Exxon. Because bifurcation of the trial was expeditious and appropriate in light of the circumstances of this case and did not result in prejudice to Exxon, we hold the district court did not abuse its discretion in choosing to take this approach.

C. *The district court's finding of extraordinary negligence.*

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.), *cert. denied*, 114 S. Ct. 2125 (1994). This standard applies to findings of fact made by admiralty trial courts. *Havens*, 996 F.2d at 217. "[R]eview under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed." *Concrete Pipe and Prod. of Cal. Inc. v. Construction of Cal., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2280

(1993) (internal quotations omitted); *see also United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991). Special deference is paid to a trial court's credibility findings. *Id.* A district court's findings of negligence, including issues of proximate cause, are reviewed under the clearly erroneous standard. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991). This standard of review is an exception to the general rule that mixed questions of law and fact are reviewed *de novo*. *Id.* "[D]eterminations of negligence in admiralty cases are findings of fact which will be given application unless clearly erroneous." *Hasbro Industries, Inc. v. M/S St. Constantine*, 705 F.2d 339, 341 (9th Cir.), *cert. denied*, 464 U.S. 1013, 104 S. Ct. 537 (1983).

Exxon "recognizes the futility of attacking on appeal the district court's finding that Captain Coyne was negligent" because of conflicting expert testimony on that issue, but argues that the district court erred: 1) in finding Captain Coyne's actions to have been extraordinarily negligent; and 2) in finding Captain Coyne's negligence, even if correctly characterized as "gross," to have been the legal cause of the loss.

The district court made detailed findings of fact and conclusions of law after the bench trial. The district court rested its conclusion that Captain Coyne was extraordinarily negligent, and that his negligence was the sole proximate and superseding cause of the ship's grounding, and thus its loss, on its findings that: 1) Exxon had failed to rebut the presumptive admiralty rules of *The Louisiana*, 70 U.S. (3 Wall.) 164 (1865), and *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); 2) even aside from these presumptions, Captain Coyne acted with extraordinary

negligence; 3) Captain Coyne acted slowly and deliberately and thus cannot have been said to have acted "in extremis;" and 4) Captain Coyne's actions constituted a superseding cause of the ship's loss under Restatement section 442 and the law of this circuit.

[8] Under the rule of *The Louisiana*, when a moving vessel strikes a charted reef, it is presumed the vessel is at fault. 70 U.S. at 173. The vessel may rebut this presumption by showing by a preponderance of the evidence that the collision was the fault of a stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident. *Id.*; *see Weyerhaeuser v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985). Because the *Houston* struck a charted reef, and because Exxon failed to meet its rebuttal burden, the district court concluded that Captain Coyne's navigation was negligent, and that this negligence was a proximate cause of the stranding.

[9] *The Pennsylvania* stands for the presumption that when a vessel violates a statutory rule meant to prevent strandings, the violation was a proximate cause of the stranding. 86 U.S. at 136. This presumption can be rebutted by a "clear and convincing showing of no proximate cause." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988). The district court found that Captain Coyne's failure to plot fixes between 1830 and 2004, and his failure to call another officer to be bridge between 1948 and 2000, while he stood there alone, violated 33 C.F.R. § 164.11 and § 164.11(a). Because Exxon failed to sustain its burden under the rule, the district court found these statutory violations were a proximate cause of the stranding.

[10] Exxon responds to these findings in a footnote, wherein it notes, with respect to the *Pennsylvania* rule, but without offering any support, that there is no duty to plot fixes in a time of peril, and, with respect to the *Louisiana* rule, that "the Ninth Circuit has questioned whether presumption of fault applies when the ship strikes a submerged structure." Exxon cites *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 366 (9th Cir. 1974), in which we "questioned" but did not decide whether the traditional rule would apply in a case where a ship struck a submerged drydock with a hidden recess. *Id.* In the instant case, the *Houston* struck a *charted reef* because her captain had not bothered to fix her position. The analogy to *Grace Line* is not apt. Exxon neither rebuts nor offers any compelling reason to ignore the traditional admiralty rules laid out in *The Pennsylvania* and *The Louisiana*.

Quite apart from these rules, the district court found that Captain Coyne "acted negligently, unreasonably and in violation of the maritime industry standars" in a number of instances. The court cited his failure to anchor properly, or to make more than one attempt to anchor; his failure to request assistance from the Coast Guard or other available ships; his failure to back the vessel far enough from shore; and his decision instead to linger unnecessarily in the vicinity of shore, only a half mile or so from the actual grounding line.

[11] Because the district court found, partly on the basis of the Captain's own testimony, that Captain Coyne acted with calm deliberation and without the pressure of imminent peril, it held him to the standard of "such reasonable care and maritime skill as prudent navigators employ for the performance of similar service." *Stevens v.*

The White City, 285 U.S. 195, 202 (1932). Exxon acknowledges the Captain remained calm, but argues that because the ship was never out of peril, a more lenient standard should have been adopted. Exxon cites no authority on appeal for this proposition. Because the district court's finding that Captain Coyne had ample time in which to reflect and act between 1830 and the time of grounding is well supported by the record, we find that the district court did not err in holding him to a reasonable standard of care.

Finally, the district court found Captain Coyne's negligence not only to be a proximate or legal cause of the stranding, but to be the sole proximate, and thus the superseding, cause of the ship's loss. On the basis of the testimony of the *Houston's* crew and expert witnesses, the district court found that "[a]lthough the breaking of the mooring chain imperilled the ship, the EXXON *Houston* successfully avoided that peril. By 1830, [she] was heading out to sea and in no further danger of stranding." The court recognized from the start that the *Houston's* reaching a point of safety was not by itself enough to break the chain of events set in place by the breakout. Under Restatement sections 442 and 447, as adopted by this Circuit, *Hunley*, 927 F.2d at 497, the Captain's actions after reaching this point of safety would have to be extraordinarily negligent to be deemed a superseding cause cutting off the liability of the defendants. The district court specifically found Captain Coyne's negligence to be extraordinary with respect to the failure to fix and plot the ship's position after 1830, and the decision to make the final starboard turn. The court also found the fact that

the ship grounded almost three hours after the breakaway "was highly extraordinary rather than normal."

Exxon argues that the court's findings of extraordinary negligence are erroneous, maintaining that none of the Captain's decisions were outside the range of discretion or "so bizarre" as to be unforeseeable, and that "the only command that lead [sic] the tanker to strand was the [right] turn order." Exxon also argues that it was unnecessary for the Captain to plot fixes because he knew his position by parallel indexing and there would have been no room on the chart to plot fixes. Finally, Exxon argues that the Captain's concern about the injured crane operator made him anxious.

Exxon interprets Captain Coyne's actions as dependent intervening, and thus not superseding, forces under Restatement section 441. Essentially, Exxon argues that all of the Captain's actions were reactions to the breakout, and thus cannot be reviewed independently. Exxon relies on *Kinsman Transit Co.*, 338 F.2d 708, 723-26 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965), for the proposition that failure to foresee danger will not excuse liability. The case is inapposite. *Kinsman* concerned liability for injuries arising from the drifting of an unmanned vessel after it came unmoored. In the portion of the case cited by Exxon, the court deemed it was foreseeable that an unmanned ship turned loose by a faulty mooring device would come to harm or collide with other vessels. *Id.* The *Houston* was not an unmanned vessel, but one fully manned by and

directed by a captain who was capable of getting her to safety before grounding her by his own acts.[7]

[12] The district court's findings that Captain Coyne's failure to take fixes was extraordinarily negligent is supported by the record. All of the expert witnesses, including Exxon's, testified that it was imprudent and contrary to industry standards for Captain Coyne not to plot fixes after 1830. The record does not support Exxon's contention that plotting fixes would have obliterated the chart. Captain Coyne made no such claim; he explained that he did not plot fixes because he felt it was unnecessary to do so. He believed that he could adequately assess the ship's position through parallel indexing. Exxon's assertion that parallel indexing was sufficient is also contradicted by all of the witnesses, including Exxon's. Captain Coyne's sole reliance on parallel indexing was, moreover, contrary to Navigation Safety Regulations, 33 C.F.R. § 164.11, and to Exxon's own Navigation Manual.

[13] The district court's finding that the final starboard turn was extraordinarily negligent is also supported by the record. Captain Coyne stated that he wanted to get away from shore, but the turn right took him toward shore. As for his concern with the hose and

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[7] *Kinsman* rejects the doctrine of last clear chance under which the trial court had excused the moorers (and the shipowner) from liability. 338 F.2d at 719. While Exxon has analogized superseding cause doctrine to last clear chance, that argument fails, and *Kinsman* does not rescue it. HIRI was not absolved of fault because Exxon had the "last clear chance" to avoid danger, but because the district court found that Exxon's independent and extraordinarily negligent actions were the sole legal cause of the stranding.

danger of collision with the *Nene*, it is undisputed that Captain Coyne made no effort to ascertain the position of the *Nene*. The district court properly rejected the Captain's argument that he could not continue to back up because of his concern for Denton, the injured crane operator, as the man was in fact not seriously injured, no one called upon the Coast Guard or other available ships for assistance in a supposed medical emergency, and the Captain's own testimony that his concerns for Denton did not in fact cause him to do anything he would not otherwise have done.

[14] In sum, the district court found that Captain Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout. Because the district court's findings are well supported by the record, we hold they are not clearly erroneous.

CONCLUSION

We hold the district court did not err in finding Captain Coyne's extraordinary negligence to be the sole proximate and superseding cause of the damage to the *Houston*, and we

AFFIRM.